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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 680

CORN PRODUCTS REFINING COMPANY AND CORN PRODUCTS SALES COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 527) is reported in 144 F. (2d) 211.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on September 18, 1944 (R. 596). The petition for a writ of certiorari was filed on November 15, 1944 and was allowed on December 18, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) (a). Whether petitioners' sales of glucose at delivered prices computed on a single basing point irrespective of actual place of shipment, and the consequent charging of higher prices to purchasers in certain cities than to purchasers in other cities by reason of the inclusion of a fictitious freight charge in such higher prices, constitutes a discrimination in price between different purchasers of the same commodity within the meaning of Section 2 (a) of the Clayton Act.

(b). Whether the evidence supports the Commission in finding that the effect of petitioners' price discriminations between different purchasers of glucose may be substantially to lessen competition among them or to injure, destroy, or prevent competition with customers who knowingly receive the benefit of discriminatory prices.

(2) (a). Whether petitioners in allowing certain favored customers, following a price advance, to book orders or to take delivery at the preceding lower price beyond the period allowed petitioners' other customers, discriminated in "price" between different purchasers of the same commodity in violation of Section 2 (a).

(b). Whether petitioners have sustained the burden of showing that the price discriminations referred to in the preceding question were made in good faith to meet the equally low price of a competitor within the meaning of Section 2 (b) of the Act.

3. Whether the evidence supports the Commission's determination that the effect of discounts which petitioners granted to certain favored purchasers of gluten feed and meal and of starch may be substantially to lessen competition among purchasers of these commodities or to injure, prevent, or destroy competition with the beneficiaries of petitioners' price discriminations.

4 (a). Whether petitioners in furnishing to Curtiss Candy Company as a purchaser of petitioners' dextrose important advertising services in connection with the sale of Curtiss candy, of which dextrose constituted from 5% to 90% of the product, discriminated in favor of the purchaser of a commodity bought for resale after "processing" within the meaning of Section 2 (e) of the Clayton Act.

(b). Whether the evidence supports the Commission's determination that the advertising services furnished by petitioners to Curtiss Candy Company were not accorded to all purchasers of their dextrose on proportionally equal terms.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) * * * it shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality,

* * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

STATEMENT

In this proceeding under Section 11 of the Clayton Act the Federal Trade Commission charged petitioners with discriminating in price between different purchasers of commodities of like grade and quality in violation of Section 2 (a) of that Act (R. 10–12). It also charged petitioners with discriminating in favor of two purchasers of dextrose against other purchasers thereof by furnishing services in connection with the sale of this commodity which were not accorded to all purchasers on proportionally equal terms, in violation of Section 2 (e) of the Act (R. 12–13).[1]

[1] The Commission also charged petitioners with violating Section 3 of the Clayton Act (R. 13–14), but petitioners have not sought review of the decision below affirming that part of the Commission's order directed against violation of Section 3. See paragraph eleven of the Commission's findings and paragraph (6) of its order (R. 485–7, 490).

The facts as to certain practices alleged to be in violation of Section 2 (a) were stipulated (R. 186–200) and evidence was introduced on the other practices charged as being in violation of that section or of Section 2 (e). At the close of the hearing the Commission filed its findings of fact [2] and conclusion (R. 464–488) and entered a cease and desist order directed against the violations of subsections (a) and (e) of Section 2 set forth in the findings (R. 488–490). The court below, on a petition to review this order, upheld its validity except for its prohibition of the practices described in paragraph five of the findings (R. 527–41), not now involved, and affirmed the order after modifying it to eliminate this prohibition (R. 489, 597).

The following findings of the Commission are pertinent to the issues now before this Court:

PETITIONERS' BASING POINT SYSTEM OF SELLING

Petitioners have two plants for the manufacture of glucose (also called corn syrup), one at Argo, Illinois, within the Chicago switching district and one at Kansas City, Missouri. The former plant has been operating since 1910 and the latter since 1922. All of petitioners' bulk sales of glucose have been made at delivered prices which have been computed, irrespective of whether the glucose was shipped from Chicago

[2] As to the practices covered by stipulation, the findings closely parallel the stipulated facts.

or Kansas City, at petitioners' Chicago price plus the freight rate from Chicago to place of delivery. Thus purchasers in all cities other than Chicago pay a higher price than do Chicago purchasers and, in cities having a lower freight rate from Kansas City than from Chicago, a part of the higher price represents "phantom" or fictitious freight (R. 467–470.)

The tabulation below shows the effect of petitioners' selling practices in twelve such cities on August 1, 1939, in cents per 100 pounds of glucose shipped in tank car lots (R. 468–469). Column (2), giving the freight rate from Chicago, shows the amount by which the price is higher than petitioners' Chicago price; column (4), giving the amount by which the freight rate from Kansas City is lower than that from Chicago, shows the phantom freight included in the higher price paid by purchasers in the cities named.

(1) City	(2) Freight Rate from Chicago	(3) Freight Rate from Kansas City	(4) Excess of Col. (2) over Col. (3)
Kansas City, Mo	40	0	40
St. Joseph, Mo	40	09	21
Springfield, Mo	40	36	4
Ft. Smith, Ark	65	45	20
Hutchinson, Kans	61	36	25
Lincoln, Nebr	45	13	32
Sioux City, Iowa	40	24	16
Waco, Tex	85	63	22
Sherman, Tex	77	54	23
San Antonio, Tex	88	69	19
Denver, Colo	66	56	10
Salt Lake City, Utah	77	67	10

Petitioners have the right to determine from which plant they will make shipments in fulfillment of orders which they accept, but all shipments to purchasers in the cities listed above, except for a "few sales," are made from the Kansas City plant (R. 467–468).

Since petitioners' Chicago price for glucose in tank car lots was $2.09 per hundred weight on August 1, 1939 (R. 468), its Kansas City customers were paying about 19% higher prices than its Chicago customers, its St. Joseph and Lincoln customers about 15% higher prices, and its Denver and Salt Lake City customers about 5% higher prices, on account of a fictitious freight charge.

Petitioners made no attempt to show that the higher prices paid by purchasers in cities having a lower freight rate from Kansas City than from Chicago made only due allowance for differences in the cost of delivery to purchasers in these cities (R. 470).

PRICE DISCRIMINATIONS GROWING OUT OF PETITIONERS' BOOKING PRACTICES

Petitioners have also discriminated in price in other ways. In the case of an advance in price, petitioners give notice thereof to the trade generally and call it to the attention of their customers by letter, telephone, or personal calls by salesmen. For a period of five days (formerly ten days) after the increase all customers are per-

mitted to "book" orders at the old price and orders so booked must be delivered within 30 days of the price advance. These bookings are not firm contracts of purchase, and an actual sale occurs only when delivery of the glucose is ordered. Petitioners have permitted certain favored customers engaged in making candy to book orders at the old price beyond the five-day period allowed their other customers and have also permitted certain favored customers to take delivery of orders booked at the earlier, lower price more than thirty days after the price advance. A variation of the latter practice has occurred when petitioners have allowed certain customers to book orders at the price for tank car deliveries and to take delivery in tank wagon quantities over extended periods of time, thus giving these favored customers a lower price than that paid by other tank wagon purchasers following the price advance. (R. 471–472.)

COMPETITIVE EFFECTS OF PRICE DISCRIMINATIONS BETWEEN DIFFERENT PURCHASES OF GLUCOSE

Glucose purchased from petitioners is one of the major raw materials used in making many varieties of candy, constituting from 5% to 90% of the finished weight. Glucose is generally used in greatest proportion in candies manufactured to sell at a few cents a pound on narrow margins of profit. As to such candies not differentiated by name or brand, customers may be diverted

from one manufacturer to another by a difference in price of a small fraction of a cent per pound, particularly in the case of candy sold to chain stores and others purchasing in large quantities. The payment by candy manufacturers of higher prices for glucose may diminish their ability to compete with those buying at lower prices. This result may be either "avoided or augmented" by other factors, such as labor, taxes, proximity to markets, etc. A number of candy manufacturers formerly located in cities other than Chicago have, since 1922, relocated in Chicago. (R. 473-474.)

PRICE DISCRIMINATIONS TO PURCHASERS OF GLUTEN FEED AND MEAL AND TO PURCHASERS OF CORN STARCH

Petitioners sell gluten meal and feed by-products of their corn refining to some 3,000 customers, and their output represents from 40% to 50% of the entire amount used in the United States. Petitioners have given to six concerns a discount of from 50¢ to 65¢ a ton from the regular market prices which they have charged to other customers, including those located in the respective areas in which the six favored concerns resell gluten feed and meal. (R. 474-479.)

Petitioners have also sold many millions of pounds of corn starch to two companies for use, consumption, and resale throughout the United States. These sales have been made at a "sub-

stantial" discount or allowance from the list price at which petitioners concurrently sold to other concerns competing with the favored companies in the use, consumption, and resale of corn starch. (R. 480.)

The discounts given by petitioners to six purchasers of gluten feed and meal and to two purchasers of corn starch are sufficient, if and when reflected in resale prices, to attract business away from competitors of these purchasers. Petitioners offered no evidence to show that these discounts made only due allowance for differences in cost resulting from selling the products to the favored companies in differing methods or quantities. (R. 479-480, 481.)

PREFERENTIAL ADVERTISING SERVICE FURNISHED TO CURTISS CANDY COMPANY

The Curtiss Candy Company spends about as much for advertising as all other candy companies in the United States combined. In 1936 it agreed with petitioners to use dextrose, which is a dry, powdered product derived from glucose, for the manufacture of most of its candies and to advertise the use of dextrose in its candies. The Curtiss Company used the dextrose purchased from petitioners in making candy by mixing it with such other ingredients as milk, butter, eggs, chocolate, and peanuts, but dextrose constituted a substantial, and frequently a major, portion of the candies sold by the Curtiss Company. Peti-

tioners, for their part, began advertising Curtiss candies as being rich in dextrose, and during the years 1936 to 1939, inclusive, spent approximately $750,000 in advertising Curtiss candies. During this period the Curtiss Company's purchases of dextrose from petititioners increased from about 1,350,000 pounds in 1936 to over 7,000,000 pounds in 1939, and the company, which had not purchased any glucose from petitioners in 1936 and 1937, bought from them in 1938 over 10%, and in 1939 nearly 60% of it glucose requirements. Petitioners during the time that they were advertising Curtiss candy sold dextrose to candy manufacturers competitive with the Curtiss Company but did not furnish advertising service to any of these competitors, and since June 19, 1936, petitioners have instructed their salesmen to advise their confectionery customers that petitioners do not contribute to the advertising done by customers. (R. 481–5.)

SUMMARY OF ARGUMENT

1. Petitioners' system of prices, under which fictional freight is charged from Chicago on shipments from Kansas City, is plainly discriminatory against purchasers in cities situated nearer freightwise to Kansas City than to Chicago. Such discriminations in price are unlawful under Section 2 (a) of the Clayton Act as amended. The sweeping contention of petitioners that the statute does not apply to sales to purchasers in different

cities is refuted by the language of the statute and its purpose. The scope of Section 2 of the Clayton Act is not narrowed by virtue of the fact that Section 3 of the Robinson-Patman Act, which imposes criminal penalties, includes among the several practices prohibited by it one practice necessarily involving geographic price discrimination.

Where purchasers are located in different communities, price differentials bearing no relation to actual cost of freight cannot be justified. The statute permits price differences based on due allowance for differences in cost of delivery; it thus prohibits price differences having no such basis.

The statute creates no exception or immunity for discriminations which stem from a form of basing-point system of prices. No decision under the original Clayton Act lends support to any such implied exemption. On the contrary, the Commission in one of its most celebrated cases ordered steel corporations to cease and desist from employing the so-called Pittsburgh-plus system of delivered prices, and the corporations filed notice of compliance with the order. In amending Section 2 of the Clayton Act, the Robinson-Patman Act was designed to strengthen its provisions in a number of respects, and to weaken them in none. Petitioners' reliance on the rejection in the House of a proposed amendment which would have outlawed all forms of basing-point systems rests on a failure to appreciate the full

scope of the proposed amendment. That proposal, by defining "price" in terms of net price, after deducting actual cost of freight, would have precluded any system of uniform delivered prices and would have required the use of the f. o. b. price system. It would have rendered nugatory, so far as delivered prices are concerned, the proviso permitting discrimination in good faith to meet the equally low price of a competitor. In rejecting the proposal, Congress left the problem of basing-point prices to be determined on the facts of each case under the general language of Section 2 (a) rather than to be determined by a rule of thumb which would have gone much beyond the scope of the existing law.

The Commission properly found that petitioners' price discriminations in the sale of glucose affected competition within the meaning of Section 2 (a). The findings, based on a stipulation, disclose that the ability of manufacturers of cheap candy to compete among themselves is affected by differences of a fraction of a cent in selling price, that the fictitious freight charged on glucose by petitioners ranges from one-tenth to four-tenths of a cent per pound, and that glucose is the principal ingredient of cheap candy. Purchasers compelled to pay the arbitrary freight differential must reduce or lose their profit margin or else attempt to increase the selling price of their product. The present case satisfies the de-

cisions which have construed Sections 3 and 7 of the Clayton Act, dealing with tying agreements and stock acquisitions, as requiring that the effect must be one which would probably lessen competition. Those decisions, in any event, impose a more stringent requirement than is appropriate here. The Robinson-Patman Act amended Section 2 of the Clayton Act to provide that the prohibited effect of discriminations might be not merely substantial injury to competition in any line of commerce, but also injury to competition with any person who knowingly receives the benefit of such discrimination or with customers. The favorably located purchasers in the present case have knowingly received the benefit of discriminatory prices.

2. Petitioners' so-called booking practices, whereby certain favored customers may place orders or take deliveries at the old prices during a longer period after a price advance than is granted to other purchasers, are also discriminatory within Section 2 (a). If these are not direct discriminations in price, they are discriminations which amount in effect to indirect discriminations in price, and these are equally prohibited. Petitioners have not sustained the burden of establishing that the booking practices were entered into in good faith to meet the equally low price of competitors, within the proviso of Section 2 (b). The court below properly held that the Commis-

sion's determination was sound in view of the lack of particularity in the evidence offered by petitioners. The effect of the discriminatory booking practices on competition raises an issue substantially similar to that considered in connection with the basing-point practices.

3. Petitioners' discounts or allowances to various purchasers of gluten feed and meal, and of starch, constituted unlawful discriminations under Section 2 (a). Petitioners' sole objection relates to the question of effect on competition, and for the reasons given in connection with the basing-point practices, the conclusion of the Commission on this point was proper.

4. Petitioners' advertising arrangement with the Curtiss Candy Company concerning dextrose was in violation of Section 2 (e) of the Clayton Act as amended. The arrangement discriminated in favor of one purchaser against other purchasers of a commodity bought for resale with processing, under the terms of Section 2 (e). Curtiss Candy Company, which was a candy manufacturer and distributor, purchased dextrose from petitioners for resale with processing. The advertising allowances were furnished upon terms not accorded to all purchasers on proportionally equal terms, as required by Section 2 (e). The sales to Curtiss were sufficiently connected with interstate commerce to bring them within the scope of the section, whether there be

read into the section a requirement that the transactions be in the course of interstate commerce or that they substantially affect such commerce.

ARGUMENT

I

PETITIONERS' DELIVERED PRICES CONSTITUTE UNLAWFUL DISCRIMINATIONS WITHIN THE MEANING OF SECTION 2 (A) OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT

A. PETITIONERS' DELIVERED PRICES ARE DISCRIMINATORY WITHIN THE MEANING OF SECTION 2 (A)

It has been shown, *supra*, pp. 6–8, that petitioners' system of delivered prices, under which freight is charged from Chicago despite the fact that shipments are made from Kansas City, results in substantial discrimination against purchasers in cities which are nearer freight-wise to Kansas City than to Chicago. As was said succinctly by the court below (R. 529), "a fictional factor is included in the sales price which is warranted in no way by actual delivery cost or other element."

In contending that these arbitrary differences in delivered prices are not discriminations within the meaning of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, petitioners make the sweeping argument that the statutory provision applies only to purchasers within the same community (Br., pp. 32–34).

There is nothing in the statutory language which would justify such a restrictive construction, and both the Senate and House committee reports indicate explicitly that the section is intended to cover purchasers located in different states. The Senate report states (S. Rep. 1502, 74th Cong., 2d sess., p. 4) that "Section 2 (a) attaches to competitive relations between a given seller and his several customers * * *" and that there is specific language in Section 2 (a) "designed to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate." Referring to the discriminations covered by the section, the report declares:

> When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. When granted to those within the State and denied to those beyond, they involve conversely ~~a directly~~ resulting burden upon interstate commerce with the latter.

See to the same effect, H. Rep. 2287, 74th Cong., 2d sess., p. 8.

In the case of the candy manufacturers involved in this case, it is obvious that their area of competition is regionwide, if not nationwide, and that their competition is effectively injured or prevented if arbitrary and important price

discriminations are consistently conferred upon their competitors. To exclude this competitive situation is to deprive the Act of any effectiveness whatever in the protection of wholesalers or manufacturers unless two or more of them are fortuitously located in the same city—a wholly arbitrary criterion. "'Where all the conditions of the relation require protection, protection ought to be given.'" *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552 (C. C. A. 2d); *N. L. R. B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, 129.

Despite petitioners' argument (Br. p. 33), Section 3 of the Robinson-Patman Act does not narrow the scope of Section 2 (a) of the Clayton Act as amended. Section 3 provides criminal penalties where, among other things, goods are sold in any part of the United States "at prices lower than those exacted * * * elsewhere in the United States for the purpose of destroying competition * * *."[3] Thus provision is made

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[3] Sec. 3 reads as follows:

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality,

for criminal penalties for certain of the practices over which the Federal Trade Commission is given jurisdiction under Section 2. Section 3 had an independent origin in the so-called Borah-Van Nuys bill in the Senate, where it was added to the Robinson-Patman Act. 80 Cong. Rec. 6346, 6351. The relationship of Section 3 to Section 2 (a) of the Clayton Act (amended by Section 1 of the bill) is sufficiently explained in the conference report (H. Rep. 2951, 74th Cong., 2d sess., p. 8):

> * * * It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions as to the particular offenses therein described and attaches to

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and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

> them also the criminal penalties therein provided.[4]

In the light of the criminal nature of Section 3, the limited application of this one clause in Section 3 to the specific practice of local price cutting (which is not singled out in Section 2), and the differing legislative genesis of the two sections, it is evident that the language of Section 3 of the Robinson-Patman Act cannot serve to restrict the interpretation of Section 2 of the Clayton Act as amended.

It is contended by petitioners that in any event the discriminations in price which are prohibited do not include discriminations resulting from the inclusion of arbitrary amounts on account of transportation. (Br. p. 34). Nothing in the statute supports the contention. Indeed, that discriminations so caused are prohibited is made clear by the proviso in Section 2 (a) permitting differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Differences in delivered prices which are not a due allowance for differences in the cost of delivery cannot be justi-

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[4] As a critic of Section 3 has put it, the clause of Section 3 quoted *supra*, p. 19, "merely prohibits local price cutting which was prohibited by the Clayton Act prior to the present law." Gordon, *Robinson-Patman Anti-Discrimination Act*, 22 Am. Bar. Assn. J. 593, 600 (1936).

fied. The Clayton Act had been more loosely drawn in this clause, since it broadly permitted discrimination "on account of" differences in grade or quantity of the commodity sold, and the Federal Trade Commission was not able to persuade the courts that grade and quantity differentials must be limited in the same way as those covered by the proviso that only such differentials be permitted as make "due allowance" for differences in the cost of selling or transportation. *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission,* 92 F. (2d) 677, 678; 101 F. (2d) 620 (C. C. A. 6th), certiorari denied, 308 U. S. 557; cf. *National Biscuit Company* v. *Federal Trade Commission,* 299 Fed. 733 (C. C. A. 2d). The Robinson-Patman Act remedied this difficulty by extending the "due allowance" clause to grade and quantity differentials as well as selling and transportation differentials. The Senate report stated (p. 5) in explaining the phrase "which makes only due allowance":

> This phrase is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials, as well as those on account of selling *and transportation costs.* It marks the zone within which differentials may be granted. (Italics supplied.)

Just as the Act would permit due allowance, but not arbitrary differences, based on difference in the cost of motor and railway transportation to

different purchasers, so it permits due allowance, but not arbitrary differences, based on differences in freight costs on account of varying distances.

There is no ground for contending that the language and expressed purpose of Congress should be denied effect because unreasonable or anomalous consequences would ensue. Making the assumption that phantom freight on shipments from Kansas City is abandoned, petitioners contend (Br. pp. 47, 59–62) that it may be necessary on occasion to ship to one buyer from the nearby mill in Kansas City and to another buyer in the same city from Chicago, and that to charge a higher delivered price to the second buyer would create discrimination or at least dissatisfaction. The statute permits different prices to be charged to buyers in the same city under these circumstances, for Congress has established its own criterion of discrimination, on the principle that it is not discriminatory to charge different prices where these prices reflect actual differences in cost of selling or transportation. Moreover, where the price to each customer depends on place of shipment, it seems clear that Kansas City customers and others similarly situated, instead of allowing petitioners to determine the place of shipment, would demand delivery from the nearby plant, and the situation suggested by petitioners would rarely arise. But if in the special circumstances suggested, petitioners on occasion did ship

from Chicago at the same delivered price as from Kansas City, and if the differential between prices at Chicago and at destination were deemed not to be within the limits of "due allowance" under the statute, still the adverse effects on competition would not be comparable to those resulting from the systematic discriminations here involved, and would doubtless not bring the prices within the condemnation of the statute.

Indeed, it is petitioners' construction of the statute which would produce anomalous results. If the meaning of the law were to be judged by a weighing of the desirability of the results produced, the uniform, systematic price discriminations against all purchasers in particular localities under the present system is far more objectionable than occasional, sporadic price differences between purchasers in the same locality. To permit sales to competing purchasers at widely different prices merely because the purchasers are situated in different localities, where the price differentials have no relation to costs of transportation, would open the door to easy evasion of the statute. Section 2 (a), it is to be noted, makes unlawful discriminations in price "either directly or indirectly." It is scarcely necessary, however, to rely on this provision against evasion, in view of the plain application of the basic statutory language to the price discriminations here involved.

B. NEITHER THE ACT NOR ITS LEGISLATIVE HISTORY SERVES TO EXCLUDE PETITIONERS' PRICE DISCRIMINATIONS FROM SECTION 2 (A) BECAUSE THEY RESULTED FROM THE USE OF A BASING-POINT SYSTEM

It has been shown that petitioners' geographic price discriminations are within the scope of Section 2 (a) of the Clayton Act, if the language of that Section is to be given effect. Petitioners argue, however, that the legislative history of the Robinson-Patman Act discloses an intention not to render illegal what is described loosely as "the basing point system". In our view, the legislative history serves, on the contrary, to reinforce the conclusion that price discriminations of the kind practiced by petitioners are unlawful under Section 2 (a).

Before examining the legislative history in detail, it is pertinent to consider the applicability of Section 2 of the Clayton Act prior to its amendment, since the terms of the Robinson-Patman Act do not single out basing-point or other practices for specific treatment. Perhaps the outstanding case brought by the Commission under the original Section 2 was against the United States Steel Corporation and its subsidiaries to compel them to cease and desist from the sale of their rolled steel products on the "Pittsburgh plus" price system. After lengthy investigation and hearings, in which more than 20 states were represented in opposition to the Corporation's

price system, the Commission issued a cease and desist order. That order, significantly, was based not on the Sherman Act but on Section 2 of the Clayton Act and Section 5 of the Federal Trade Commission Act. 8 F. T. C. 1. As petitioners assert (Br., pp. 35–36), the proceeding did not soon reach the courts. But this was because the Corporation chose not to seek review and instead filed with the Commission a formal statement of intended compliance with the order, though without admitting its validity.[5] Of this proceeding, which attracted unusually widespread attention, it has been said that "this may well be

[5] The notice of compliance stated:

Pursuant to the order made by the Federal Trade Commission in the above entitled cause, dated July 21, 1924, the respondents, United States Steel Corporation, American Bridge Company, American Sheet and Tinplate Company, Carnegie Steel Company, National Tube Company, American Steel and Wire Company, Illinois Steel Company, Minnesota Steel Company, and Tennessee Coal, Iron and Railroad Company, report as follows:

1. Respondents, without admitting the validity of said order or the jurisdiction of the commission to make the same, have determined to conform thereto, and will hereafter conform thereto, in the sale of their various products, insofar as it is practicable to do so.

2. Respondents have abandoned the Pittsburgh Plus system, as defined in said order throughout their various organizations and will not hereafter make use of the same.

3. Respondents will not quote for sale or sell their rolled steel products upon any other basing point than

said to be the Commission's greatest case." Mechem, *The "Pittsburgh Plus" Case,* 10 A. B. A. J., 806, 811 (1924).

In the face of such a complete capitulation on the part of the defendants, there was obviously no immediate necessity for the Commission to take further action against them.[6] Approximately ten years later, in response to inquiries from the Congress and the Executive whether the functioning of the steel industry under the NRA Code of Fair Competition was violative of the antitrust laws and to what extent collusive bidding had taken place on the part of steel manufacturers

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that where the products are manufactured or from which they are shipped.

4. Sales from manufacturing plants, fabricating plants, and warehouses will be made f. o. b. plant or warehouse, or at delivered prices, as occasion may offer. In all cases of sales at delivered prices the contract of sale or the invoice will clearly and distinctly indicate how much is charged for the steel products sold f. o. b the producing or shipping point, and how much is charged for the actual transportation of such products, if any, from such producing or shipping point to destination.

5. All f. o. b. selling prices, whether at the mills, warehouses, or fabricating plants and all delivered prices will be non-discriminatory within the meaning of the second section of the Clayton Act, but will be subject to the variations permitted by said act.

[6] In 1938, however, after the enactment of the Wheeler-Lea amendment attaching penalties to violations of Commission orders (52 Stat. 111), the Corporation petitioned for review in the Third Circuit, and the Commission cross-petitioned for enforcement. The case is still pending.

applying for Government orders, the Federal Trade Commission submitted the reports referred to in petitioners' brief (pp. 37, 40): *Practices of the Steel Industry Under the Code*, Sen. Doc. No. 159, 73d Cong., 2d sess. (1934); *Report of the Federal Trade Commission to the President with Respect to the Basing Point System in the Iron and Steel Industry* (1934); *Report to the President on Steel Sheet Piling* (June 10, 1936). Because these requests for information were obviously to determine whether there was concerted action violative of the Sherman Act, the Commission's reports naturally were limited to that feature. It is completely unwarranted to infer, therefore, as petitioners do, that these reports represented in any way a retreat from the firm position which the Commission had taken in 1924 that the basing-point system used by the steel industry violated Section 2 of the Clayton Act.

While it is objected that there was no great number of cases attacking basing-point systems under Section 2, the explanation relates to Section 2 itself and not to the problem of basing points in particular. It is well known, and indeed was one of the dominant reasons for the enactment of the Robinson-Patman Act, that the original Section 2 was almost a dead letter, principally because of judicial misconstruction of the language and weaknesses in certain of its provisions, making enforcement unduly difficult. It had

been held, for example, that a showing of effect on competition as between customers of the defendant was insufficient, and that there must be shown an effect on competition between the defendant and its own rivals. *Mennen Company* v. *Federal Trade Commission*, 288 Fed. 774 (C. C. A. 2), certiorari denied, 262 U. S. 759; *National Biscuit Company* v. *Federal Trade Commission*, 299 Fed. 733 (C. C. A. 2). Not until the decision of this Court in 1929 in *Van Camp & Sons Company* v. *American Can Company*, 278 U. S. 245, were the foregoing decisions disapproved. Until the doctrine laid down in these decisions was overruled, it would have been extremely difficult to attack the application of a basing-point system where the major discriminatory effects of such a system were directed to customers, rather than to other manufacturers and shippers. The vagueness of the proviso permitting discriminations in good faith "to meet competition" was another deterrent to enforcement. The requirement that competition in a line of commerce, and not simply the competition of particular firms, must be affected, was still a further weakness. Cf., *e. g.*, *Vivadeau Corp.* v. *Federal Trade Comm'n*, 54 F. (2d) 273 (C. C. A. 2). The Commission itself, in a report which was part of the background of the Robinson-Patman Act, stated in 1936: "It is apparent that section 7 has become a virtual nullity * * *. As to enforcement of Section 2 of the Clayton Act the situation is not

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much more favorable. * * * The principal difficulties of enforcement grow out of the provisos regarding quantity, cost of selling, and meeting competition." *Final Report on the Chain Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st. sess., 89–90. The Commission also stressed the discouraging effect of the decisions in the *Mennen* and *National* cases, *supra*. *Id.*, at 90. See also *id.*, at 63–65.

It was to remedy these defects in Section 2 and thus to strengthen generally its provisions that the Robinson-Patman Act was adopted. See Sen. Rep. 1502, 74th Cong., 2d sess., p. 3; H. Rep. 2287, 74th Cong., 2d sess., p. 3; *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. (2d) 620, 623–4. In short, the dearth of cases under Section 2 reflects not at all on the question of its applicability to discriminations taking the form of basing-point practices where the requisite statutory elements are present.

Nor is there anything in this Court's opinions in *Maple Flooring Association* v. *United States*, 268 U. S. 563, and *Cement Manufacturers Association* v. *United States*, 268 U. S. 588, decided in 1925, to which petitioners have referred (Br., p. 31), which casts doubt on the subjection of basing-point prices such as are here involved to Section 2 of the Clayton Act. Those cases were brought under the Sherman Act and the central question was one of concerted action. Moreover, the comments which the Court made on the basing-

point system involved in the *Cement* case show clearly that it was regarded as a system markedly different from that in the present case. In upholding the distribution of freight rate books in the *Cement* case, the Court pointed out that the books were employed in carrying out a system of pricing under which the basing points "are points of actual shipment from which the larger proportion of the cement in a given locality in which cement is manufactured is actually shipped" (p. 597). Furthermore, as described by the Court, the system there employed was one in which producers compared the freight rates from their own mill and from a mill nearer the purchaser, in order to meet, where necessary, the latter's price. The Court said (pp. 598–599):

> * * * If there were no blanket freight rate the competing mills must still use the rate from a given basing point in order to compete with the mills located in the vicinity of that chief point of production. In either case the freight rate from the basing point is an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement. The freight-rate book, therefore, not only enables the manufacturer to calculate a delivered price on the basis of his own mill price, which he determines, to

> points in the territory nearest in point of freight rate to his own mill, but it enables him also to determine at once the freight differential which he must offset in his mill price in order to compete with other manufacturers serving any other given territory.

What was there said thus has reference to the Sherman Act and to a system of multiple basing points under which the lowest freight rate to the purchaser is taken in order to meet competition.

With this background we turn to the legislative history of the Robinson-Patman Act insofar as it relates to basing-point prices. The situation is not one where courts had held or stated that basing-point prices were outside the scope of Section 2 of the Clayton Act, and where the amendatory legislation must consequently be viewed in terms of a purpose to override such judicial declarations. Compare *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533; *Helvering* v. *Griffiths*, 318 U. S. 371. As originally introduced, as passed by each House, and as finally enacted after conference, the measure contains nothing suggesting the exclusion from its scope of discriminations which may be traced to a basing-point system.

Transportation differentials were authoritatively declared to come within the scope of the Act. In presenting the Conference Report to the House, Congressman Utterback, Chairman of the House Conferees, explained the exemption

from the prohibitions of the Act of price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Dealing specifically with the question of freight differentials, he said:

> Where the methods of delivery are the same, but the distance is different, price differences in such cases may, of course, be made to reflect those differences. In such case the price is really paid both for the commodity itself and for its delivery, and the differing freight rates or commercial trucking rates applicable to the different delivery distances involved are, of course, differences in cost which may be reflected in differences in such delivered price. (80 Cong. Rec. 9417 (1936).)

There would have been no point in laboring the fact that price differentials which reflected real differences in cost of freight were justified under the Act, unless it were true that differentials which did not reflect such differences in freight were not justified. See also pp. 22–23, *supra*.

In the face of this legislative background, petitioners rely on the rejection by the House of a proposed amendment which would have completely outlawed the basing-point system of delivered prices. In order to understand the significance

of this rejection, it is necessary to appreciate exactly what the proposed amendment would have accomplished. It was intended to be inserted as subsection (5) of Section 2, and was submitted by the House Judiciary Committee when it reported the bill. H. Rep. 2287, 74th Cong., 2d sess., p. 2. The proposal was drawn in terms of a definition of "price" and read as follows:

> That the word "price" as used in this section 2, shall be construed to mean the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor.

As is obvious, that provision would not only have made any basing-point system unlawful, even where the delivered prices under a multiple basing-point system were employed to meet the low price of a competitor, but it would have outlawed the entire system of uniform delivered prices and required the use of the f. o. b. system of pricing. The report of the House Committee stated this explicitly (*id.* p. 14):

> It would seem that the basing-point method of selling commodities clearly results in unlawful price discrimination, that it results in the lessening of competition, and that it tends to create a monopoly. In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodi-

ties. It will require the use of the f. o. b. method of sale.

So absolute and drastic a measure did not fail to encounter opposition, and it was announced that the Committee itself agreed to withdraw the proposal. 80 Cong. Rec. 8102, 8140. While some members of the House felt that it should be included, it was voted down. 80 Cong. Rec. 8224. Opposition was voiced on behalf of farm organizations, one of which objected "to the provisions of subparagraph 5 which would eliminate the multiple basing point system of sales." *Id.*, 8118. See also *id.*, 8106, 8122. The most comprehensive statement in opposition to the proposal was made by Congressman Citron (quoted in part in Pet. Br. pp. 90–92), who pointed out that "This paragraph involves more than the so-called basing-point system." (80 Cong. Rec. 8224.) He stressed the argument that under the basing-point system manufacturers and wholesalers by establishing a more or less uniform delivered price, were enabled to meet competition outside of their own local freight areas and to attain wider national or regional markets. In addition to this defense of uniform delivered prices, he stressed the objection that under a compulsory f. o. b. price system, manufacturers would not be able to compete with foreign manufacturers selling at ports of entry in the United States. He said (*id.*, 8223): "* * * It would result in forcing f. o. b. shipping prices on manufacturers; but

with this provision eliminated they will not
forced to charge f. o. b. shipping point pr
Otherwise, many would not be able to comp
with foreign manufacturers, for instance, f
Canada, who would not be subject to this p
vision if it remained in the bill."

Under the proposed definition of "price", far-reaching results would have been brou about. Uniform delivered prices would have b unlawful, and the proviso entitling a produce show that his discriminatory "prices" were m in good faith to meet the "equally low pric a competitor"—a proviso contained in the H Bill as it had been reported by the Judic Committee (80 Cong. Rec. 8139)—would l been rendered nugatory so far as delivered pr are concerned. The House determined that problems raised by such a measure should be for separate treatment. 80 Cong. Rec. 8224.

In the Senate there was no parallel discuss for no similar proposal was offered. In course of the general debate on the bill, howe similar concern was expressed lest the mea prohibit delivered prices. Senator Duffy as whether the bill made delivered prices illega that Wisconsin manufacturers could not sel distant markets. He read a telegram stating the "bill prohibiting delivered prices will el nate Wisconsin manufacturers from dis markets or necessitate factory operations out

the state * * *". 80 Cong. Rec. 6287. Senator Logan gave assurance that "there is nothing at all like that in the Robinson bill." After the conference report was presented, there was a colloquy, quoted in petitioner's brief (p. 83), on the question whether the proposed legislation "changes in any way the present status of the basing-point plan now used by steel and cement and other natural-resource industries." 80 Cong. Rec. 9903. Senator Borah, to whom the question was directed, replied prudently, "I could not answer offhand, because I am not sure that I know the exact operation of the basing-point plan in the steel industry." Senator Davis stated, "Under the basing-point plan in the steel industry the markets all over the country are available for anyone who is engaged in that industry." On the basis of this description, Senator Borah replied, "My opinion would be that this does not have any effect upon that." Senator Van Nuys agreed. 80 Cong. Rec. 9904. The colloquy indicates that discriminations were not meant to be immune merely because they stemmed from a basing-point system; beyond that, it indicates either that a system of uniform delivered prices was not made illegal, or that the question of the validity of the basing-point plan in the steel industry was left unaffected by the bill.

The bills before Congress referred to by petitioners (Br. pp. 43–44) were comparable to the

provision in paragraph 5 of the amended House bill which was rejected. They would, to be sure, have rendered any basing-point system unlawful *per se.* They would, in fact, have required prices to be fixed f. o. b., at least at the purchaser's option. Thus, S. 4055, 74th Cong., 2d sess., on which extensive hearings were held, (*Hearings before the Committee on Interstate Commerce, United States Senate*) recited as its first purpose "to prevent methods of pricing under which certain industries follow the practice of making uniform delivered prices, * * *." It would have made unlawful any addition "to the shipping point price of any commodity * * * [of] a charge for delivery to destination other than the actual cost of delivery through such agency as the purchaser may elect to specify." It made no provision for any degree of absorption of freight charges within a concept of "due allowance," or for delivered prices fixed in good faith to meet competition, and the illegality of the delivered prices did not depend on any showing of effect on competition. It is quite understandable, therefore, that the Commission pointed out the greatly simplified task of enforcement under such a statute. See *Report to the President on Prices of Sheet Steel Piling* (1936) 41: "Once Congress has created an anti-basing point bill, the immense expense of separate investigation and the laborious trial of separate suits would be avoided."

(Pet. Br. p. 37). See also Hearings, *supra*, at 325, where Commissioner Freer stated: "It may be said that such enactment would avoid the delay, expense, and uncertainty of protracted and expensive litigation in each individual case in numerous industries." This is very different from an avowal that the Clayton Act and the Robinson-Patman Act do not render unlawful price discriminations resulting from the use of a basing-point system where all the requisites of the statute are shown to be present.

What was said in *Helvering* v. *Clifford*, 309 U.S. 331, 337–338 is applicable, *mutatis mutandis*, here: "In view of the broad and sweeping language of section" 2, "a specific provision covering" basing-point prices "might well do no more than to carve out of" the general prohibition "a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb * * * must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case" an unlawful discrimination exists.

The application of Section 2 (a) in the present case does not require or permit a consideration of the general merits or evils of basing-point systems. Petitioners contend (Br. 63) that the enforcement of Section 2 (a) as interpreted by the Commission would discourage the decentralization

of production. As indicated by the discussion in Congress (*supra*, pp. 35–36), this argument relates to a system of more or less uniform delivered prices over a market area, and not to a system of arbitrary price differentials like that here involved. Moreover, the record in this case discloses a trend toward centralization on the part of petitioners' customers, some of whom moved to Chicago where they were able to take advantage of petitioners' price system. The same tendency in other industries employing basing-point systems has been remarked by the Commission.[7] Much of the eco-

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[7] Referring to a prior report to the Senate, the Commission stated (Report of the Federal Trade Commission to The President With Respect to the Basing-Point System in the Iron and Steel Industry, November, 1934, p. 17; cf. p. 25):

> The report of the Commission to the Senate stated that the power of selecting, discontinuing, or enlarging the number of basing points involved the power of deciding what cities should be built up as centers for the remanufacture and processing of steel products and what cities should be handicapped by not being recognized as basing points. It was pointed out that the tendency was opposed to what is commonly considered as desirable decentralization of industry. The exercise of this power under the basing-point system is predicated upon the negation of advantages of location bestowed by nature, thus building up industry on an artificial and uneconomic basis which in effect exacts an unnecessary subsidy from the public.

nomic controversy over basing-point systems is even more irrelevant to the present case.[8]

[8] One economic controversy has turned on the issue of the desirability in particular industries of a system of multiple basing-points with a high frequency of so-called freight absorption, a system unlike that of petitioners. Thus Professor de Chazeau, supporting some form of basing-point system for the steel industry, stated (Public Policy and Discriminatory Prices of Steel, 46 J. Pol. Econ. (1938) 537, 541):

> It is well to reiterate that the ultimate issue between proponents of a basing-point and an f. o. b. mill plan for steel is whether geographic discrimination through freight absorption is in the public interest. Phantom freight in the delivered price of steel may be (and has been) reduced by a multiplication of basing points and by special regulations governing the computation of prices in given areas. Its further reduction or eradication may be advocated or opposed on other grounds, but the point is not vital to the pricing system. The same is not true, however, of freight absorption, the elimination of which would mean the death of the basing-point practice.

Id. at 565:

> * * * We found that *some* form of basing-point system (i. e., essentially, the right to absorb freight) is required by the structure of the industry and that consequent discrimination in pricing might necessitate some degree of public control. (Italics in original.)

Compare Fetter, *The New Plea for Basing-Point Monopoly*, 45 *id.* 577 (1937); 46 *id.* 567 (1938).

Another controversy turns on the extent to which a basing-point system producing identical prices in an industry is itself indicative of collusive action. Cf. Mund, *Monopolistic Competition Theory and Public Price Policy*, 32 Amer. Econ. Rev. 727 (1942); Clark, *Imperfect Competition Theory and Basing-Point Problems*, 33 *id.* 283 (1943).

C. THE FINDINGS AND EVIDENCE SUPPORT THE COMMISSION'S DETERMINATION THAT PETITIONERS' DISCRIMINATIONS IN PRICE BETWEEN DIFFERENT PURCHASERS OF GLUCOSE HAVE THE ADVERSE EFFECT ON COMPETITION WHICH BRINGS THE DISCRIMINATIONS WITHIN THE CONDEMNATION OF SECTION 2 (A) OF THE ACT

Petitioners contend (Br. 45–47) that the words "to discriminate in price" apply to differences in price only when there is a "competitive relationship" between the purchasers concerned and the price difference is of substantial injury to the prejudiced buyers. But Section 2 (a) itself defines what competitive effects render price differentiations (not within any proviso of the section) illegal price discriminations. Plainly no additional showing of competitive relationship or injury is required. Accordingly if, as previously shown, the statute applies to price discriminations of the kind resulting from petitioners' basing-point system of selling, the only question remaining open is whether the record supports the Commission in finding any of the effects on competition specified in Section 2 (a).

Petitioners contend (Br. 48–59) that the Commission's findings (directly based upon stipulated facts) are insufficient to support its conclusion that the freight "pick-up" or differential included in petitioners' higher price to purchasers in certain cities "may be substantially to lessen competition" or "to injure, destroy, or prevent competition with any person who * * * knowingly receives the benefit" of the discrimina-

tion. To accede to this contention is to draw an inference from the undisputed facts contrary to that drawn by the Commission and sustained by the court below and would contravene the rule laid down in *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63:

> The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission.

See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *National Labor Relations Board* v. *Southern Bell Tel. & Tel. Co.*, 319 U. S. 50, 60.

The findings set forth that a difference in price of a small fraction of a cent per pound is sufficient to divert trade as among manufacturers of candy which does not carry a trade name and is sold to volume purchasers; that glucose is the principal ingredient of such candy; that petitioners discriminate in price between such purchasers by including in the higher price to certain purchasers a fictitious freight charge ranging from $^{1}/_{10}$ to $^{4}/_{10}$ cent per pound; and that payment of the higher prices represented by this fictitious charge diminishes the ability of the purchasers to compete with those paying petitioners' lower prices (*supra*, pp. 7, 9–10).

We submit that these undisputed facts not only justify but require the inference that petitioners' price discriminations will probably substantially

lessen competition. As the court below said,[9] "We think it irrefutable from the facts that resulting substantial loss is reasonably likely to accrue to purchasers in the less favorably located communities" (R. 531). The purchasers compelled to pay the arbitrary freight differential have one of two choices—either to absorb the additional cost of their raw material in their own selling prices, thus narrowing profit margins perhaps to the vanishing point, or to attempt to pass on the additional cost to their own customers, with consequent loss in volume of sales. Either course leads to an impairment of the purchasers' ability to compete and will probably substantially lessen the competition of those adversely affected.

Nor can petitioners derive comfort from the finding (R. 474) that the effect of their discriminatory prices in lessening competition may be "avoided or augmented" by differences among purchasers of their glucose in other cost factors such as labor, taxes, proximity to markets, etc. This finding, to the extent that it is relevant,[9] supports the inference that, at least as to some of the purchasers affected, the discriminatory prices are likely to force them out of the field of produc-

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[9] As the Federal Trade Commission has remarked, "Advantages whose effect 'may tend' partially to offset the effect denounced by the statute have no logical bearing upon the legal status of the practice prohibited." *Chain Stores, Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st sess. (1934).

tion of cheap candy for volume purchasers. In this connection the finding that some candy manufacturers formerly located elsewhere than Chicago have subsequently moved to that city is not without significance.

The case thus falls squarely within the rule laid down in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the authority upon which petitioners chiefly rely. In that case, involving the prohibition in Section 3 of the Clayton Act of tying-clause agreements the effect of which "may be to substantially lessen competition," the Court said (p. 356) that the Clayton Act sought to reach the practices embraced within its sphere "in their incipiency." And the Court said (pp. 356–357) that the purpose in using the word "may" was not to prohibit "the mere possibility of the consequences described" but was to prevent such agreements as would under the circumstances disclosed "probably lessen competition."

Petitioners also rely upon *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, where it was held that the Commission's finding that International Shoe's acquisition of the capital stock of another shoe company might have the effect of substantially lessening competition between the two companies was without support in the evidence. The Court, having reached the conclusion that the evidence affirmatively showed absence of any substantial competition between

the acquiring and the acquired corporations,[10] said (p. 298) that Section 7 of the Clayton Act does not prohibit "the lessening of competition, which, to begin with, is itself without real substance."

There is not in the present case, as there was believed to be in the *International Shoe* case, affirmative evidence establishing no substantial competition between those affected by the acts or practices against which the statutory prohibition is directed. In contrast, the undisputed findings in the instant case fully support the inference of substantial competition between the beneficiaries of petitioners' lower price and the purchasers discriminated against in price. Petitioners' sales of glucose are nation-wide, the sales are "largely" to candy manufacturers, and the purchasers most affected by discriminatory prices are companies making cheap candy for sale on a strictly price basis to chain stores and others purchasing in large quantity, in other words, to those who buy candy for sale, not in a local market, but for distribution over wide areas (R. 467, 474).

Petitioners also cite (Br. 49) certain decisions by lower federal courts dealing with the effect on competition which will render a tying-clause agree-

[10] The bases for this conclusion were (1) that the companies were competitive only as to products of the same character and offered to the same class of customers and (2) that officers of International Shoe had testified to the absence of any real competition. See, however, the dissent by the present Chief Justice, concurred in by Justices Holmes and Brandeis (280 U. S. 291, 303-306).

ment or a stock acquisition illegal under Section 3 or Section 7 of the Clayton Act. These cases all undertake to apply the interpretation given the statute in the *Standard Fashion* case or the *International Shoe* case and add little, by way of analysis or reasoning, to those decisions. We therefore believe it unnecessary to discuss the individual lower court rulings to which petitioners refer.

In considering the meaning which is to be placed upon the prohibition in Section 7 against acquisitions of stock where the effect may be substantially to lessen competition between the companies in question, it is to be borne in mind that the competition which is lessened is that of a company whose stockholder-owners have acceded thereto by agreeing to part with their stock. There might, in this situation, be some basis for holding that the prohibition is confined to acquisitions tending to bring about a lessening of competition sufficiently substantial in character to be of public concern. The victims of discriminatory prices, on the other hand, rarely, if ever, voluntarily assent to the discrimination. The obvious purpose of the statute is to offer protection to the individual concerns suffering from price discrimination. Clearly, as to Section 2, the sole test must be whether there is reasonable probability that their competition will be substantially lessened by the discrimination, and there is no justification for importing the further test of whether there is probability of a lessening

of competition on such a scale as to be against the public interest.

We have up to this point discussed solely the provisions of Section 2 (a) which make price discrimination illegal if the effect may be substantially to lessen competition. But the section also renders illegal any discrimination if the effect may be to "injure * * * competition with any person who * * * knowingly receives the benefit of such discrimination." This language does not appear in Section 3 or Section 7 of the Act, or in Section 2 prior to its amendment by the Robinson-Patman Act. Its clear meaning is to protect persons against price discrimination injurious to their ability to compete, without a further requirement of a showing that competition is "substantially" injured.

As to whether Chicago or other favorably located purchasers "knowingly" receive the benefit of a discriminatory price, the court below pointed out that petitioners' pricing system is "well known to the public" and customers in favorably located cities therefore know that they are receiving a price which does not include the fictional freight charge included in the higher price paid by purchasers in other cities (R. 533). Petitioners urge (Br. 57) that purchasers are without knowledge of discrimination because they do not know when they place their orders whether shipment will be made from Chicago or from Kansas City. But purchasers know that petitioners will ordinarily,

if not almost universally, ship from the point giving petitioners the greater return, that is, from the place which will yield them a fictional freight charge in the price received. The purchasers in the favored localities therefore know that they are granted on most of their purchases a price which does not include the fictional freight charge being paid on substantially all purchases made in the localities in which this charge is included in the price. Furthermore, the Commission found that actual sales occur not when orders are placed but when delivery is made (R. 472). At time of actual sale, therefore, the benefit of the discrimination is "knowingly" received.[11]

II

PETITIONERS, BY ALLOWING CERTAIN FAVORED CUSTOMERS OF GLUCOSE TO BOOK ORDERS OR TO OBTAIN DELIVERIES, FOLLOWING A PRICE ADVANCE, AT THE PRECEDING LOWER PRICE BEYOND THE PERIOD ALLOWED PETITIONERS' OTHER CUSTOMERS, VIOLATED SECTION 2 (A) OF THE ACT

We have previously described (*supra*, pp. 8–9) the booking practices which the Commission determined constituted illegal price discriminations,

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[11] The record so convincingly demonstrates that the price discriminations are "knowingly" received by the beneficiaries thereof that it is unnecessary to consider whether, under the statute, the knowing receipt of a benefit must be proved in the case of persons who are direct "customers of" the grantor of the discrimination, as is the case here. The word "knowingly," which appears not to qualify "customers of" the grantor, was evidently inserted through an erroneous impression that buyers were penalized under Section 2 of the

i. e., permitting customers generally to book orders at the old price, following a price advance, only within a 5-day period and permitting delivery under such orders only within 30 days after the advance but allowing certain favored customers to book orders and to obtain delivery beyond the respective 5-day and 30-day periods.[6] In addition, certain favored tank wagon customers who had entered orders in tank car lots were permitted to take delivery under their orders for extended periods of time when petitioners' other tank wagon customers were required to purchase at the higher prices established in the interim by petitioners.

Petitioners contend (Br. 64–66) that their booking practices constitute discriminations not in "price" but in "terms of sale" and that Congress intended to exclude terms of sale from the price discriminations prohibited by subsection (a) of Section 2, as evidenced by the fact that terms of sale are specifically dealt with in subsections (c), (d), and (e) of Section 2. It is true that the bill as originally reported to the Senate prohibited discrimination both in price and in "terms of sale" (Sen. Rep. No. 1502, 74th Cong., 2nd Sess.) and that the latter words were stricken by the Conference Committee. The Conference Commit-

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Clayton Act, as under Section 3 of the Robinson-Patman Act. See 80 Cong. Rec. 6350, 6351; cf. H. Rep. 2951, 74th Cong., 2d sess., pp. 5–6.

tee, in reporting on this deletion, said (H. Rep. No. 2951, 74th Cong., 2nd Sess., p. 5):

> The managers were of the opinion that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the meaning of the remainder of subsection (a).[12]

The Conference report thus makes it clear that subsection (a) applies to terms of sale where they "amount in effect to indirect discriminations in prices." Certainly a practice whereby favored customers are given a lower price for glucose in circumstances in which this lower price is unavailable to their disadvantaged competitors is an indirect, if not a direct, discrimination in price falling within subsection (a).

Petitioners also rely (Br. 65–66) on the third proviso in subsection (a) reading: "That nothing herein contained shall prevent persons engaged in selling goods * * * from selecting their own customers in bona fide transactions and not in restraint of trade." The argument is that booking an order for future delivery with one customer, while refusing to make with another customer

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[12] Petitioners in quoting this sentence (Br. 65) from the conferees' report have inadvertently substituted the word "subsection" for "subsection (a)." In view of the actual language of the report, petitioners are obviously in error in arguing that the "reminder of the subsection" referred to in the above report includes subsections (b), (c), and (e) of Section 2.

the same kind of contract, amounts merely to a selection of the customers with whom they will deal. But petitioners in fact are dealing with both sets of customers, granting to some a discriminatory price denied to others, and are therefore not merely selecting from among their customers those with whom they choose to deal.

Petitioners also contend (Br. 66–67) that they are within the proviso of subsection (b) of Section 2 which states that nothing contained in the section shall prevent a seller rebutting a prima facie case of discrimination by showing that his lower price "was made in good faith to meet an equally low price of a competitor." Petitioners object to the fact that, despite testimony which they presented purporting to establish that their "booking" discriminations were made in good faith to meet equally low prices of competitors, the Commission made no findings as to the existence or non-existence of good faith. The court below, in dealing with this point, said that the testimony offered by petitioners to justify their action under subsection (b) was "general in character and vague in effect" (R. 534). The court said further (*ibid.*):

> There was no testimony as to specific instances or facts but merely a conclusion upon the part of the witnesses that the *prima facie* case of discrimination was justified by competition. This, it seems to

> us, is not the sort of testimony sufficient to sustain a finding of exemption provided by Congress for meeting competition or to justify a finding that the *prima facie* case of discrimination as to booking practices has been rebutted.

The meaning of the proviso of subsection (b), in the light of the legislative history of the Robinson-Patman Act, is discussed in the Government's brief (pp. 23-27) in the related, pending case of ***Federal Trade Commission* v. *Staley Manufacturing Co.*** (No. 559, this Term) and the application of the proviso to testimony similar to that upon which the present petitioners rely is dealt with in that brief (pp. 31-36). Under the views there set forth the testimony in the present case, if within the characterization thereof given by the court below, plainly does not establish justification under subsection (b). We submit that the testimony to which petitioners refer (R. 220, 221, 227) falls within the court's characterization of it and that petitioners have therefore failed to make out a defense, under subsection (b), of their booking practices.

Petitioners also contend (Br. 67-68) that there was failure to show the effect on competition which would bring the price discriminations given in connection with "booking" under the prohibitions of subsection (a). The facts and law relevant to this question are precisely the same as

those already discussed (*supra*, pp. 41-48) with reference to the competitive effect of the price discriminations growing out of petitioners' basing point system of selling and need not be repeated here. And while petitioners suggest that the relevant facts were stipulated only as to price discriminations involving their basing point system of selling, the stipulation was not so confined but was entered into "with reference to the matters alleged in Count I" of the amended complaint (R. 195). This count charges in general terms that petitioners violated subsection 2 (a) of the Act by selling glucose and certain other products at discriminatory prices (R. 10-12).

Petitioners deal as a separate point (Br. 69-70) with discriminatory prices given to certain tank wagon purchasers. What the Commission found to be illegal was permitting certain tank wagon customers to obtain deliveries for periods of approximately 90 days after the giving of their orders although during the latter part of such time their other tank wagon customers were, because of intermediate price advances made by petitioners, required to pay higher prices (R. 472-473). The testimony presented by petitioners that certain competitors had offered to sell in tank car lots to petitioners' favored tank wagon customers is not related to the violation found by the Commission, namely, allowing an extended period for booking delivery under orders placed with petitioners.

III

PETITIONERS' DISCOUNTS OR ALLOWANCES TO VARIOUS CUSTOMERS PURCHASING GLUTEN FEED AND MEAL, AND TO KEEVER STARCH COMPANY AND STEIN-HALL COMPANY IN CONNECTION WITH THE SALE OF STARCH, CONSTITUTE VIOLATIONS OF SECTION 2 (A) OF THE CLAYTON ACT, AS AMENDED

A. THE FACTS CONCERNING THESE DISCOUNTS OR ALLOWANCES

As a product of their corn refining operations, petitioners produce gluten feed and meal in the amount of more than 250,000 tons annually, which is approximately 40 to 50% of all such products used in the United States (R. 108, 109, 474). Unlike their pricing methods on glucose, petitioners sell the gluten feed and meal produced at their Kansas City plant at the Kansas City price plus freight to destination; and the feed and meal produced at their Pekin and Argo, Illinois, plants, at the Chicago price plus freight to destination (R. 475). There are some 3,000 customers for these products scattered throughout the country (R. 474). However, six large purchasers have by special contracts or agreements been given allowances of 50 cents per ton, and in some cases 65 cents per ton, off their regular market price (R. 186–190, 475–479). These purchasers are Allied Mills, Inc., Chicago, Ill.; Cooperative G. L. F. Mills, Inc., Buffalo, N. Y.; E. W. Bailey & Co., Montpelier, Vt.; Jesse C. Stewart & Co., Pittsburgh, Pa.; Marshfield Milling Co., Marsh-

field, Wis.; and Farley Feed Co., Janesville, Wis. (R. 186–190, 475).

It was stipulated by the parties and found by the Commission that the purchasers who were the beneficiaries of these allowances were in competition with other dealers to whom petitioners sold gluten feed and meal without such allowances, both in the sale of prepared mixed or branded feed products and in the resale of feed and meal products unmixed (R. 186–190, 476–479). It was further stipulated and the Commission found that the 50 cents per ton allowance is "sufficient, if and when reflected, in whole or in substantial part in resale prices, to attract business" to the favored companies away from their competitors "or to force said competitors to resell such feed and meal products at a substantially reduced profit or to refrain from reselling" (R. 188–190, 479). These allowances were "sufficient to substantially increase" the respective "margins of profit over and above the margins of profit otherwise obtainable in the resale of such feed and meal products" (R. 189, 190, 479). It was also stipulated that the petitioners had not produced and would not offer evidence that these allowances did not make more than due allowance for differences, if any, in the cost of manufacture, sale, or delivery (R. 191, 479, 480).

Since June 19, 1936, petitioners have sold substantial quantities, amounting to many millions of pounds, of certain kinds of starch and starch

products to Keever Starch Company, Stein-Hall Company, and competitors of Keever Starch Company and Stein-Hall Company. Discounts and allowances from petitioners' prices were made to Keever Starch Company and Stein-Hall Company, but not to their competitors (R. 191, 192, 480). Petitioners make no contention that these discounts or allowances were justified by savings in the cost of manufacture, sale or delivery resulting from the different methods by which the starch was sold to these concerns as compared with its sale to other buyers (R. 192, 193, 481). As in the case of gluten feed and meal allowances, such a discount or allowance was sufficient to substantially increase Keever's and Stein-Hall's respective margins of profit over and above the margin of profit otherwise obtainable in the use, consumption, and resale of starches and starch products, and is sufficient, if and when reflected in whole or in substantial part in resale prices, to attract business to Keever and to Stein-Hall away from their competitors, or to force such competitors to resell said starches and starch products at substantially reduced profit, or to refrain from reselling. The said discount, rebate, commission, or other allowance granted Keever and to Stein-Hall may be sufficient to attract the business of such purchasers away from competitors of petitioners, or to force said competitors to sell such starches and starch products at substantially reduced

profit, or to refrain from selling (R. 480, 481, 192, 193):

B. THESE ALLOWANCES AND DISCOUNTS HAVE THE EFFECT ON COMPETITION NECESSARY TO BRING THEM WITHIN THE SCOPE OF SECTION 2 (A) OF THE CLAYTON ACT

Petitioners challenge none of the Commission's findings, but repeat in connection with these discounts the same argument that they have made with respect to the basing point method of pricing glucose. They urge that these allowances and discounts have not been demonstrated by the Commission to have had a substantial effect on competition. The impact of a price allowance of this general character and extent on a low-cost bulk commodity, where slight changes in cost or price translate themselves automatically into either diminishing net profits or diminishing net volume of sales, and the fact that Section 2 (a) was meant to cover price discriminations which had such an impact, have been extensively discussed in connection with the basing point method of pricing glucose (*supra,* pp. 41-48) and need not be repeated here.

IV

PETITIONERS' ADVERTISING ARRANGEMENT WITH THE CURTISS CANDY COMPANY CONCERNING DEXTROSE VIOLATES SECTION 2 (E) OF THE CLAYTON ACT

A. THE FACTS CONCERNING PETITIONERS' ADVERTISING ALLOWANCE TO CURTISS

While the facts concerning this aspect of the case were not stipulated, the evidence on which

the Commission relies is not disputed by the petitioners:

(1) In 1936, and prior thereto, dextrose, also known as refined corn sugar, was a new product to the housewife, the consumer, and the confectionery industry (R. 174). Although petitioners had been manufacturing and selling dextrose before 1936, approximately 80% of their dextrose business had been with the baking industry. Petitioners desired to expand the use of dextrose by other industries, including candy manufacture (R. 175). This involved persuading those manufacturers to engage in considerable research to determine whether they could use dextrose in the manufacture of candy (R. 175). Petitioners at first approached two candy manufacturing companies, the Bachman Chocolate Manufacturing Company and the Lewis Candy Company, with the idea of persuading those companies to use dextrose and to publicize, through their advertising and sales media, the use of dextrose as an ingredient in their candies; but these experiments, which involved the expenditure of $8000 and $30,000, respectively, failed (R. 61, 62, 180, 181). Petitioners also approached the Mars Candy Company with a similar proposal, but that company was unwilling to undertake the experiment (R. 62). Then, in 1935 and 1936, petitioners entered into negotiations with the Curtiss Candy Company with a similar end in view. Finally, in September, 1936, after Curtiss had done research for

about a year, with petitioners' help, to ascertain whether dextrose could be used in its candies, Curtiss entered into the arrangement described in paragraphs (2) and (3) herein (R. 175, 296, 316, 317, 481). Curtiss had as wide a distribution and was as aggressive as any other candy manufacturer in the United States, and its national advertising over a period of ten years was almost equal to that of all the others in the field (R. 300, 301, 481).

(2) Pursuant to the September, 1936, arrangement, petitioners have spent over $750,000 within the three-year period 1936–39 for the purpose of advertising Curtiss candies as being rich in dextrose (R. 297, 482, 483). During the same period, although Curtiss was left free to purchase dextrose from other companies producing and selling dextrose (R. 296, 297, 318), it has in fact purchased none from anyone except petitioners (R. 294, 295), and its purchases of dry dextrose from petitioners increased over fivefold, reaching a total of seven million pounds in 1939 (R. 291, 484). During the same period, Curtiss increased its purchases of glucose (which contains substantial amounts of dextrose) from petitioners, from nothing in 1937 to almost 15 million pounds in 1939, representing almost 60% of its total purchases (R. 291, 292, 484).

(3) Neither petitioners nor Curtiss were under any contractual obligation to spend any definite amounts or any amount at all for advertising

(R. 61, 318, 483). During the three-year period when petitioners were spending $750,000 in advertising the dextrose used in Curtiss candies, Curtiss' total advertising expenditures were at least twice as alrge as those of petitioners (R. 61, 177). Curtiss also, at substantial expense to itself, agreed to show the words "rich in dextrose" on all of its wrappers and other containers, in its display advertising, and upon the uniforms of its peddlers (R. 174, 179, 302, 303, 317, 482). However, Curtiss agreed to and did place its national radio and magazine advertising through petitioner's advertising agency, and advertisements were worked up in which Curtiss advertised its candies as containing dextrose, and petitioners advertised the use of dextrose as an ingredient in Curtiss candies (R. 178, 297, 485).

(4). During the three year period in which petitioners were spending $200,000 or more a year to advertise Curtiss candies, they spent nothing for advertising the candies of any other customer purchasing dry dextrose from them (R. 57, 485). Furthermore, they have instructed their salesmen to advise customers to whom they sold products to be used in candy manufacture that they do not contribute to the advertising done by customers (R. 162, 485). However, petitioners' vice president testified that petitioners are ready at any time to enter into similar advertising arrangements on a proportional basis with any other candy manufacturer who is willing to use

sufficient dextrose in his candy to advertise it as "rich in dextrose," to advertise the dextrose content as a feature of his candies on labels, boxes, and store advertising, and to change his wrappers and other advertising media for the purpose; in addition, the arrangement would be dependent on "their product, their distribution, their sales force, and the type of organization they have" (R. 179–180).

B. CURTISS CANDY COMPANY IS A "PURCHASER" OF A COMMODITY WITHIN THE MEANING OF SECTION 2 (E)

Most of petitioners' objections to the Commission's conclusion that these facts support a violation of Section 2 (e) are based on what the Government considers illicit interpretations of Section 2 (e), involving, as a matter of fact, the ingrafting of restrictive language on its literal text. For this reason, it seems appropriate to repeat the language of Section 2 (e):

> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Petitioners contend that the advertising ar-

rangement which has just been described does not fall within Section 2 (e), because the arrangement was not made with the Curtiss Candy Company "as a purchaser" from petitioners, but was an entirely fortuitous matter unrelated to Curtiss' purchases from petitioners. Such a disavowal of the connection between the lavish expenditures which petitioners made to advertise Curtiss candies exclusively, and the tremendous increase in Curtiss' purchases of dextrose and glucose from petitioners, taxes credibility. However, it is not necessary to stress this point, because petitioners' argument requires, on its legal side, that the statute be reworded to read as follows: "It shall be unlawful for any person to discriminate, *in a purchase contract*, in favor of one purchaser against another purchaser * * *". [italics indicate new language impliedly inserted in the statute by petitioners]. To insert such restrictive language by administrative or judicial action is to deprive the remedial statute of effectiveness by allowing the form of the transaction to determine its substantive legality. To leave such an obvious loophole for avoidance of the congressional purpose would be a wholly unwarranted exercise of statutory construction.

C. CURTISS CANDY COMPANY IS THE PURCHASER OF A COMMODITY "BOUGHT FOR RESALE WITH * * * PROCESSING" WITHIN THE MEANING OF SECTION 2 (E)

Petitioners' next restrictive parsing of the statute is based on the argument that Curtiss

buys dextrose from petitioners, uses it in the manufacture of candy together with other ingredients, and produces an entirely new commodity called "candy." Petitioners argue that, on the basis of the industrial operations involved, the Commission has advanced no evidence which justified it or this Court in holding that Curtiss was the purchaser "of a commodity bought for resale, with or without processing."

The simple question posed is whether the dextrose which Curtiss buys can be described as a commodity bought by it for resale "with processing." There appears to be nothing in the legislative history of the Robinson-Patman Act specifically concerned with the definition of the term "processing," although analysis of the circumstances and committee reports which led to the passage of the Act would seem to confirm the Government's conclusion that the term is applicable to the operations of Curtiss with respect to the dextrose purchased by it; see pp. 68–69, *infra*. The conversion of dextrose into candy conforms to the present-day administrative understanding of the term "processing," in which Congress has acquiesced, and satisfies the formal definitions of processing contained in the few court cases which have had occasion to define the term.

The literal meaning of words used in a statute will be given effect wherever possible. *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 217; *United States* v. *Merriam*, 263 U. S. 179, 187;

United States v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 277. The conversion of dextrose into candy meets the definition of "processing" adopted by the Court in *Cochrane* v. *Deener,* 94 U. S. 780, 788, which has been cited with approbation in subsequent cases:

> A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing.

See also *P. E. Sharpless Co.* v. *Crawford Farms, Inc.,* 287 Fed. 655, 658 (C. C. A. 2); *Bedford* v. *Colorado Fuel & Iron Corporation,* 81 P. (2d) 752, 757 (Colo.). The *Cochrane* and *Sharpless* cases are doubly persuasive in that they deal with the processing of food products; and candy, into which dextrose is processed, is a food product. It is also clear that a raw material which is processed into a manufactured product may be "transformed * * * to a different state" not only by mechanical means (as petitioners appear to urge), but by chemical means as well. See *Bedford* v. *Colorado Fuel & Iron Corporation,* 81 P. (2d) 752, 757 (Colo.); cf. *Kennedy* v. *State Board of Assessment and Review,* 276 N. W. 205, 206 (Iowa).

Not only do decisions define processing in such a way as to embrace the conversion of dextrose into candy, but processing taxes have been levied since 1933 on various chemical transformations of

agricultural staples that change completely the identity of the original commodity; e. g., corn converted into dextrose; beets and cane into sugar; and grain into whiskey. Likewise never challenged by the taxpayer or the courts, and specifically acquiesced in by the Congress, is the application of a tax on the "processing" of coconut oil into shortening powder or soap. *Colgate-Palmolive-Peet Co.* v. *United States,* 320 U. S. 422; *Loose-Wiles Biscuit Co.* v. *Rasquin,* 95 F. (2d) 438 (C. C. A. 2), certiorari denied, 305 U. S. 611; *Tasty Baking Co.* v. *United States,* 38 F. Supp. 844 (Court of Claims), certiorari denied, 314 U. S. 654; *Cincinnati Soap Co.* v. *United States,* 22 F. Supp. 141 (S. D. Ohio). Not once has the suggestion been raised that the type of chemical alteration involved in these cases is not validly described as a processing.

In *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52 (C. C. A. 8), cited by petitioners (Br. p. 76), the court said (p. 57) that the meaning of the word "processing" as used in that case was not to be determined in the abstract but "must be controlled by the context and the legislative intent" and that a remedial statute was entitled to a liberal construction. That case involved the interpretation of a provision of the Fair Labor Standards Act of 1938 exempting from the operatiton of the Act employees engaged in "processing" certain aquatic forms of animal and vegetable life or by-products thereof. The Act as a whole was to be construed

liberally, and therefore this exemption had to be construed strictly. The court accordingly held that the making of buttons from the shells of fresh-water clams was so far removed from the type of processing which the exemption was intended to cover (i. e., the preservative treatment and preparation for market of perishable products) as not to fall within the exemption. The *Fleming* case, therefore, besides being limited to its own peculiar facts and statutory language, supplies a rule of statutory interpretation which would clearly substantiate the application of the term "processing" to the conversion of dextrose into candy.

This Court, in the somewhat different context of *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, has pointed out that terms "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship," and that "where all the conditions of the relation require protection, protection ought to be given" (p. 129). The Congressional Committees sponsoring the Robinson-Patman Act clearly set forth that the purpose of adoption of the Act was "to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them." S. Rep. 1502, 74th Cong. 2d sess., p. 3; H. Rep. 2287, 74th Cong., 2d sess., p. 7; *General Shale Products Corp.* v. *Struck Construction Co.*, 37 F. Supp. 598, 602 (W. D. Ky.)). Certainly no "sound economic differences" have been advanced

by petitioners for justifying the discrimination involved in their allowances to Curtiss.

While there is no evidence of the way in which Section 2 (e) attained its present form, the disputed language in the subsection is most easily understood by reading it consecutively. Section 2 (e), like the statute as a whole, is a remedial provision intended to make unlawful a discrimination "in favor of one purchaser against another purchaser or purchasers of a commodity." Lest the Federal Trade Commission be confronted with the impossible burden of policing retail sales to ultimate consumers and in order to limit the section to wholesale transactions, the limitation was added that the commodity be "bought for resale." Lest manufacturer-distributors be exempted from the scope of the Act and petitioners' point be raised that a commodity which was processed into different form and then resold was not "bought for resale," the explanatory words "with or without processing" were added. That Congress intended to include manufacturer-distributors as well as wholesaler-distributors within the scope of Section 2 (e) is further borne out by the fact that the services or facilities the furnishing of which are prohibited by the section include not only those connected with "the handling, sale, or offering for sale" of the commodity, but "services or facilities connected with the processing" thereof.

The Robinson-Patman Act was largely the outgrowth of a desire to protect independent busi-

nessmen and merchants from discriminatory competition arising out of the superior purchasing power of large national and regional chains. Foremost among the studies relied on by the sponsoring committees of the bill was the Final Report on its Chain Store Investigation submitted by the Federal Trade Commission, S. Doc. No. 4, 74th Cong., 1st Sess., which contained a comprehensive analysis of the competitive practices and buying advantages of the chains. S. Rep. No. 1502, 74th Cong., 2d Sess., p. 2; H. Rep. No. 2287, 74th Cong., 2d Sess., p. 3. That report made explicit what was already common knowledge, to wit, that many chains manufactured a substantial part of the commodities wherewith their stores were supplied. It specifically pointed out that, in the case of confectionery, shoe, and ready-to-wear clothing chains, manufacturing was the primary business, with the operation of chain stores as a secondary consideration; that manufacturing chains operated over 50% of the total number of stores in nine kinds of business (including the confectionery business, of which Curtiss is a member), and are responsible for over 50% of the total sales of all chains operating in three lines of business, including the confectionery line; and that over 70% of the sales of manufacturing chains in seven kinds of business, including confectionery, is represented by goods of their own manufacture (pp. 12–14). When these factors

are properly appraised it becomes clear why Congress was assiduous to include within section 2 (e) purchases which were subject to "processing" before being resold. It also becomes apparent that to allow purchases by these manufacturing chains to escape from the application of the Robinson-Patman Act, merely because they subject their purchases to manufacturing processes, is to remove from the protection of the Act small competitors in all of these lines whom it was the primary purpose of Congress to protect. Furthermore, to allow manufacturing chains (and, by the same token, manufacturing industries) to purchase without regard to the anti-discriminatiton provisions of section 2 (e), is to give such types of business operations and lines of industry an unwarranted advantage over pure wholesalers or distributors, whose purchases remain subject to the provisions of the section.

Both the processor and the process are therefore within the fair contemplation of Section 2 (e). Curtiss was a distributor of candy as well as a candy manufacturer. In fact, the record clearly shows that Curtiss made very large expenditures in order to advertise the distribution of their candies on a national scale, and that a predominant feature of that national advertising was the emphasis which it placed upon dextrose as a constituent of candy. Furthermore, to limit "processing" to mechanical as contrasted with chemical alterations of a commodity is to insert

an irrational exemption into the statute, one which will result in arbitrarily different treatment of different classes of manufacturer-distributors because of a mere physical difference in the nature of their processing operations and not for any valid economic reason.

This case does not involve petitioners' hypothetical query as to whether a baking company which used iodized salt in its bread could properly describe such bread as "processed iodized salt," for dextrose cannot with any semblance of reason be described as a minor ingredient in the manufacture of candy. It was stipulated and found by the Commission and by the court below that dextrose constituted as much as 90% of cheaper candies by weight. (R. 485.) To argue that such a preponderant component of a final manufactured product is not in fact processed into such a product would read an irrational exemption into Section 2 (e) depriving of its protection that large class of manufacturers who employ chemical rather than mechanical procedures in their processes of manufacture.

D. PETITIONERS' ADVERTISING ALLOWANCES TO CURTISS CONSTITUTE DISCRIMINATIONS AGAINST OTHER "PURCHASERS OF A COMMODITY" WITHIN THE TERMS OF SECTION 2 (E)

Petitioners contend that there is no proof present in this case of discrimination between purchasers of dextrose for resale. Their argument in this regard is a threefold one,—first, that there was no evidence in the record or finding by the

Commission that the dextrose sold by petitioners to other companies than Curtiss engaged in the manufacture of candy was in fact used by those companies in the manufacture of candy; second, that even assuming the dextrose to have been so used, these other companies, like Curtiss, were not "purchasers of a commodity for resale, with processing"; and third, that no proof was made that any of the four concerns named as competitors of Curtiss had in fact suffered injury or that the advertising arrangement with Curtiss was of a nature which those four concerns desired and which petitioners denied to them. The second of these contentions is the same as that made with respect to Curtis itself, and has just been dealt with (see *supra*, pp. 63–71).

With respect to the first contention, the president of Curtiss himself testified that four manufacturers of package candies, Nutrine Candy Company, E. J. Brach & Sons, M. J. Holloway Company, and Chase Candy Company, were in a greater or less degree competitors of Curtiss (R. 301). The quantities of dry dextrose which were sold by petitioners to these companies during the period 1936–1939 were stipulated in the record, without any objection as to materiality or relevance being raised by petitioners' counsel (R. 320–321); certainly, if these purchases were not in fact used in the manufacture of candy, they would have no place in the record. The

Commission's finding on this point does not refer to specific named firms, but to competing candy manufacturers as to whom it was stipulated first, that substantial quantities of dextrose were delivered; second, that no offer of advertising allowances on equal terms were made (and who, as a matter of fact, were advised by petitioners' salesmen that no such services were furnished); and third, that no such allowances or services were in fact furnished (R. 485). Petitioners themselves have conceded in their briefs the probability that the dextrose was in fact used in the manufacture of candy.

With respect to petitioners' third contention, it seems clear that where one customer obtains a substantial advertising allowance of $750,000 over a period of three years, and four other customers during the same period obtain no advertising allowances at all (R. 294, 295, 297, 482, 483), the first customer has received a benefit and the four other customers have been correspondingly disadvantaged. So much of petitioners' assertion that the Commission has failed to establish discriminatory effects as rests upon their contention that Curtiss' four competitors did not desire advertising allowances or services covers considerations that duplicate those involved in petitioners' fifth point, which is next dealt with (*infra*, pp. 74–75).

E. PETITIONERS' ADVERTISING ALLOWANCES TO CURTISS CONSTITUTED A "FURNISHING" AND "CONTRIBUTING TO THE FURNISHING OF * * * SERVICES OR FACILITIES CONNECTED WITH * * * HANDLING, SALE, OR OFFERING FOR SALE" OF THE DEXTROSE PURCHASED BY CURTISS, WITHIN THE MEANING OF SECTION 2 (E)

Petitioners contend that the advertising arrangement entered into with Curtiss did not involve "the furnishing or contribution to the furnishing" on their part of "any services or facilities connected with the processing, handling, sale, or offering for sale" of the dextrose purchased by Curtiss from them. Here, once again, they read into the section a requirement which has no basis in its language, for their argument is based on the fact that the publicity provided by the advertising arrangement was of immense value to petitioners, and that they did not enter into the arrangement as a service to Curtiss. Obviously, advertising services or allowances possess value for the sellers who afford them to favored buyers; it is implicit in his extension of advertising allowances to a buyer that the seller reaps benefits therefrom as well as the buyer. It likewise seems clear that these allowances were "services and facilities" to Curtiss irrespective of any statements by either the grantor or the grantee of the allowance formally designating them as such. To eliminate from the coverage of Section 2 (e) situations where advertising allowances happen to be dictated by the self-interest of the

grantor of the allowance, or are not in written and formal terms proclaimed as services to the purchaser, would be to nullify completely the language and purpose of the statutory provision, which requires no more than that the facilities or services furnished a preferred buyer be "connected with the * * * handling or offering for sale" of commodities purchased.

F. PETITIONERS FURNISHED ADVERTISING ALLOWANCES TO CURTISS "UPON TERMS NOT ACCORDED TO ALL PURCHASERS ON PROPORTIONALLY EQUAL TERMS," WITHIN THE MEANING OF SECTION 2 (E)

Petitioners' only point with respect to the Curtiss advertising allowance which is predicated in any substantial way on disagreement with the Commission's findings is their argument that there has been no failure on their part to accord the same arrangement to others of their purchasers on proportionally equal terms. They rely on the fact that they had offered a similar arrangement to other companies before it was offered to the Curtiss Candy Company in 1936, and had, in fact, entered into a similar arrangement with at least two other candy manufacturers; that petitioners' officers testified to their willingness to make similar arrangements with other concerns who were similarly situated to Curtiss with respect to their distribution and advertising; and that there was testimony that no other customer had sought such an arrangement with the petitioner, and that consequently no other customer had been refused.

Petitioners' argument ignores several facts. In the first place, neither the fact that petitioners offered advertising allowances to other companies prior to 1936 (conceding that such offers were commensurate with that entered into with Curtiss), nor their statements of willingness to extend such allowances to other customers in the future, made in 1939 (after they had already been accused of violating the Robinson-Patman Act in this regard) are relevant to the main issue. These facts are no evidence at all as to whether they offered such arrangements to petitioners' competitors on "proportionally equal terms" during the period 1936–1939, when they were conferring $750,000 worth of advertising allowances on Curtiss. Furthermore, the "experiments" which had been made prior to 1936 with the Bachman Chocolate Manufacturing Company and the Lewis Candy Company were admittedly made in a small way (R. 61, 62, 180, 181), and their promise to render such an arrangement proportionally available to competitors in the future is, as yet, untested by experience. Finally, the Commission justifiably felt that it could not ignore, as petitioners appear to do, petitioners' instructions to their salesmen to advise other customers that they do not contribute to the advertising done by such customers (R. 162, 485), and the actual fact that petitioners had spent no money at all for ad-

vertising the candies of any other purchaser of dry dextrose from them (R. 57, 485).

Section 2 (e) does not require *purchasers* to *request* allowances similar to those offered their competitors from their sellers; in view of the customarily secret nature of such allowances, it requires the *sellers* to *accord* advertising allowances granted one purchaser to all purchasers "on proportionally equal terms." Also, for petitioners to urge that Curtiss was the only company with a volume of sales and a scale of national advertising large enough to justify advertising arrangements of this type, is squarely to blink the mandate of the statute that such allowances be "accorded to all purchasers on proportionally equal terms." This phrase was interpreted by both the House and Senate Judiciary Committees in exactly the same way:

> The phrase "proportionally equal terms" is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities or other consideration in the quantities specified. Where a competitor can furnish them in less quantity, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. (H. Rep.

2287, 74th Cong., 2d Sess., p. 16; S. Rep. 1502, 74th Cong., 2d Sess., p. 8.)

Petitioners' insistence upon a volume of sales and scale of distribution equivalent to Curtiss' has the practical effect of depriving of proportional treatment competitors who can furnish advertising services but can furnish them "in less quantity" than Curtiss.

Petitioners' very contentions underscore the clear support in the evidence for the Commission's finding that advertising allowances were not "accorded to all purchasers on proportionally equal terms."

G. PETITIONERS' SALES OF DEXTROSE TO CURTISS WERE SUFFICIENTLY CONNECTED WITH INTERSTATE COMMERCE TO BRING THOSE TRANSACTIONS WITHIN THE SCOPE OF SECTION 2 (E)

Petitioners' last point with respect to advertising allowances gives this Court an option as to additional language that should be read into Section 2 (e). They urge, as a first possibility, that the Court should construe Section 2 (e) to apply only to transactions "in the course of commerce," on the ground that Sections 2 (a), (c), and (d) apply to transactions "in the course of commerce." Apart from the fact that the omission in Section 2 (e) may have been purposeful rather than inadvertent, it seems clear from the record that petitioners are "persons engaged in commerce" and that the advertising allowances are made "in the course of such commerce." Peti-

tioners' alternative suggestion, based on constitutional considerations, that the Commission be required to prove that the advertising allowances "substantially affect interstate commerce" is more than met by the showing that has been made with respect to the volume of Curtiss' purchases of dextrose and glucose from petitioners; the interstate and national character of Curtiss' business, which was concededly the primary motivation for petitioners' extension to them of advertising allowances; the fact that petitioners' advertising allowances amounted to the substantial sum of $750,000 over a period of three years; and Curtiss' admission that they competed in the sale of their candies with all manufacturers of one-cent and five-cent bars (see pp. 59–60, *supra;* R. 301). *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 (1941), supplies no clue as to the statutory interpretation of Section 2 (e), for it concerns Section 5 of the Federal Trade Commission Act, adopted in 1914, which limits the Commission's jurisdiction to "unfair methods of competition in commerce." Also, it presents no constitutional impediment to the exercise of administrative authority in this case, because the *Bunte* case revolved around an issue of statutory and not constitutional interpretation.

Since petitioners fail to show error in the Commission's conclusion that the advertising allowances granted by petitioners to Curtiss constituted an ille-

gal discrimination under Section 2 (e) of the Clayton Act the provisions of the order based on this conclusion, should be upheld.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Respectfully submitted.

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FEBRUARY 1945

U. S. GOVERNMENT PRINTING OFFICE 1945

SUPREME COURT OF THE UNITED STATES.

No. 680.—October Term, 1944.

Corn Products Refining Company, and Corn Products Sales Company, Petitioners, *vs.* Federal Trade Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 23, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioners, a parent corporation and its sales subsidiary, use a basing point system of pricing in their sales of glucose. They sell only at delivered prices, computed by adding to a base price at Chicago the published freight tariff from Chicago to the several points of delivery, even though deliveries are in fact made from their factory at Kansas City as well as from their Chicago factory. Consequently there is included in the delivered price on shipments from Kansas City an amount of "freight" which usually does not correspond to freight actually paid by petitioners.

The Federal Trade Commission instituted this proceeding under § 11 of the Clayton Act, c. 323, 38 Stat. 730, 15 U. S. C. § 21, charging that petitioners' use of this single basing point system resulted in discriminations in price between different purchasers of the glucose, and violated § 2(a) of the Act, as amended by § 1 of the Robinson-Patman Act, c. 592, 49 Stat. 1526, 15 U. S. C. § 13. The complaint also charged petitioners with other discriminations in prices, or in services rendered to favored customers, which will presently be stated in detail, all in violation of § 2(a) or § 2(e) of the Clayton Act, as amended.

Section 2(a) provides in part:

"(a) . . . it shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the

benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."

After hearings, at which much of the evidence was stipulated, the Commission made its findings of fact. It concluded that petitioners had violated § 2 of the Clayton Act, as amended, and ordered them to cease and desist from such violations. On petition to review the Commission's order, the Circuit Court of Appeals for the Seventh Circuit sustained the order, except in particulars not material here. 144 F. 2d 211.

We granted certiorari, 323 U. S. —, because the questions involved are of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems. The principal questions for decision are whether, when shipments are made from Kansas City, petitioners' basing point system results in discriminations in price between different purchasers of glucose, within the meaning of § 2(a); and, if so, whether there is support in the evidence for the finding of the Commission that these discriminations have the effect on competition defined by that section. Further questions are raised as to whether the other discriminations charged violate § 2(a) and § 2(e).

I. *Basing Point Practices.*

The evidence as to petitioners' basing point system for the sale of glucose was stipulated. The Commission found from the evidence that petitioners have two plants for the manufacture of glucose or corn syrup, one at Argo, Illinois, within the Chicago switching district, and the other at Kansas City, Missouri. The Chicago plant has been in operation since 1910, and that at Kansas City since 1922. Petitioners' bulk sales of glucose are at delivered prices, which are computed, whether the shipments are from Chicago or Kansas City, at petitioners' Chicago prices, plus the freight rate from Chicago to the place of delivery. Thus purchasers in all places other than Chicago pay a higher price than do Chicago purchasers. And in the case of all shipments from

Kansas City to purchasers in cities having a lower freight rate from Kansas City than from Chicago, the delivered price includes unearned or "phantom" freight, to the extent of the difference in freight rates. Conversely, when the freight from Kansas City to the point of delivery is more than that from Chicago, petitioners must "absorb" freight upon shipments from Kansas City, to the extent of the difference in freight.

The Commission illustrated the operation of the system by petitioners' delivered prices for glucose in bulk in twelve western and southwestern cities, to which shipments were usually made from Kansas City. On August 1, 1939, the freight rates to these points of delivery from Chicago were found to exceed those from Kansas City by from 4 to 40 cents per hundred pounds, and to that extent the delivered prices included unearned or phantom freight. As petitioners' Chicago price was then $2.09 per hundred pounds, this phantom freight factor with respect to deliveries to these twelve cities represented from 2 to 19% of the Chicago base price. From this it follows, as will presently be seen, that petitioners' net return at their Kansas City factory on sales to these twelve cities, in effect their f. o. b. factory price, varied according to the amount of phantom freight included in the delivered price.

Much of petitioners' glucose is sold to candy manufacturers, who are in competition with each other in the sale of their candy. Glucose is the principal ingredient in many varieties of low priced candies, which are sold on narrow margins of profit. Customers for such candies may be diverted from one manufacturer to another by a difference in price of a small fraction of a cent per pound.

The Commission found that the higher prices paid for glucose purchased from petitioners by candy manufacturers located in cities other than Chicago, result in varying degree in higher costs of producing the candies. The degree in each instance varies with the difference in the delivered price of the glucose, and the proportion of glucose in the particular candy. Manufacturers who pay unearned or phantom freight under petitioners' basing point system necessarily pay relatively higher costs for their raw mate-

rial than do those manufacturers whose location with relation to the basing point is such that they are able to purchase at the base price plus only the freight actually paid. The Commission found that the payment of these increased prices imposed by the basing point system "may . . . diminish" the manufacturers' ability to compete with those buyers at lower prices.

The Commission concluded from these facts that petitioners' basing point system resulted in discriminations in price among purchasers of glucose, and that the discriminations result in substantial harm to competition among such purchasers. Petitioners challenge each conclusion.

First. Section 2(a) of the Clayton Act, as amended, makes it unlawful for any person "either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. . . ." The statute permits differentials "which make only due allowance for differences in costs of manufacture, sale, or delivery. . . ."

Petitioners' pricing system results inevitably in systematic price discriminations, since the prices they receive upon deliveries from Kansas City bear relation to factors other than actual costs of production or delivery. As in the case of the twelve cities selected by the Commission for illustrative purposes, the freight actually paid by petitioners in making deliveries usually varies from the freight factor from Chicago, used in computing the delivered price. When the actual freight is the lesser of the two, petitioners charge and collect unearned or phantom freight; when it is the greater, petitioners absorb the excess freight, which they pay, but do not include in the computation of their delivered price.

In either event, on shipments from Kansas City, the delivered price to the purchaser depends not only on the base price plus the actual freight from Kansas City, but also upon the difference between the actual freight paid and the freight rate from Chicago which is included in the delivered price. This difference also results in varying net prices to petitioners at their factory at Kansas City, according to the destination of the glucose. The factory net varies according as petitioners collect phantom freight or absorb freight, and in each case in the amount of this freight

differential.[1] The price discriminations resulting from this systematic inclusion of the freight differential in computing the delivered price are not specifically permitted by the statute. Hence they are unlawful, unless, as petitioners argue, there is an implicit exception to the statute for such a basing point system.

Petitioners point out that there is no discrimination under their basing point system between buyers at the same points of delivery, and urge that the prohibition of § 2(a) is directed only at price discriminations between buyers at the same delivery points. There is nothing in the words of the statute to support such a distinction, since the statute is not couched in terms of locality. And its purpose to prevent injuries to competition through price discriminations would preclude any such distinction, not required by its language. The purchasers of glucose from petitioners are found to be in competition with each other, even though they are in different localities. The injury to the competition of purchasers in different localities is no less harmful than if they were in the same city.

We find nothing in the legislative history of the Clayton or Robinson-Patman Acts to support the suggested distinction. It is true that § 3 of the Robinson-Patman Act, 15 U. S. C. § 13a, incorporating the Borah-Van Nuys Bill, S. 4171, 74th Cong., 2d Sess., imposes criminal penalties for selling goods "in any part

he illustrative prices found by the Commission show this sharply varying factory net also the amounts of phantom freight. The figures given are upon deliveries from as City for August 1, 1939, when the Chicago base price was $2.09.

	A	B	C	D	E	F
	Freight from Chicago	*Delivered Price (Chicago Base Price, $2.09, plus Column A)*	*Actual Freight from Kansas City*	*Net to Petitioners at Factory in Kansas City (Column B minus Column C)*	*Variance in Petitioners' Net from their Net on Deliveries at Kansas City*	*Phantom Freight (Column A minus Column C)*
as City, Missouri	$.40	$2.49	$.00	$2.49	$.00	$.40
oseph, Missouri	.40	2.49	.09	2.40	—.09	.31
gfield, Missouri	.40	2.49	.36	2.13	—.36	.04
Smith, Arkansas	.65	2.74	.45	2.29	—.20	.20
inson, Kansas	.61	2.70	.36	2.34	—.15	.25
ln, Nebraska	.45	2.54	.13	2.41	—.08	.32
City, Iowa	.40	2.49	.24	2.25	—.24	.16
Texas	.85	2.94	.63	2.31	—.18	.22
nan, Texas	.77	2.86	.54	2.32	—.17	.23
Antonio, Texas	.88	2.97	.69	2.28	—.21	.19
er, Colorado	.66	2.75	.56	2.19	—.30	.10
Lake City, Utah	.77	2.86	.67	2.19	—.30	.10

of the United States at prices lower than those exacted . . . elsewhere in the United States for the purpose of destroying competition . . . ." But this section does not restrict the operation of the prohibitions, with civil sanctions, of the Robinson-Patman amendments to § 2(a) of the Clayton Act. This was specifically pointed out by the Conference Report on the Robinson-Patman Act.[2] H. Rep. No. 2951, 74th Cong., 2d Sess., p. 8.

Petitioners further contend that basing point systems were well known prior to the enactment of the Robinson-Patman Act and were considered by Congress to be legal. From this petitioners conclude that they remained legal in the absence of a clear command to the contrary. Cf. *Parker* v. *Motor Boat Sales*, 314 U. S. 244; *Helvering* v. *Griffiths*, 318 U. S. 371. But we think that the premise fails, and with it the conclusion, whatever it might be if the premise were valid.

In support of the legality of basing point systems, petitioners rely on *Maple Flooring Assn.* v. *United States*, 268 U. S. 563, 570, and *Cement Manufacturers Assn.* v. *United States*, 268 U. S. 588, 597. But these were suits to restrain violations of the Sherman Act, and did not involve the prohibition of the Clayton Act upon discriminations in price. The only question for decision in those cases was whether there was a concerted price-fixing scheme among competing sellers, accomplished in part by their adoption of a uniform basing point system; in fact, no prohibited concert of action was found.

In any event, the basing point systems involved in those cases were quite unlike that used by petitioners. In the *Maple Flooring* case, *supra*, the single basing point was so close to most of the points of production as to result in but trivial freight variances; and the defendants in that case were willing to sell on a f. o. b. mill basis, whenever the purchaser so requested. In the *Cement* case, *supra*, the defendants used a multiple basing point system, with a basing point at or near each point of production. Under this system, any manufacturer, in order to compete in the territory closer freightwise to another, would absorb freight, by adjusting his mill price to make his delivered price as low as that of his competitors. Under this system the delivered price for any locality was determined by the nearest basing point. We have no occasion to decide whether a basing point system such as

[2] The report said: "Section 3 authorizes nothing which that amendment [to § 2 of the Clayton Act] prohibits, and takes nothing from it."

that in the *Cement* case is permissible under the Clayton Act, in view of the provisions of § 2(b), permitting reductions in price in order to meet a competitor's equally low price. Cf. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, No. 559, decided this day.

When the Robinson-Patman Act was adopted in 1936, there was no settled construction of the Clayton Act in the federal courts contrary to that now urged by the Commission, as was the case with the measures involved in *Helvering* v. *Griffiths, supra.* Nor was there any settled administrative construction to the contrary. In fact in 1924 in the only decision involving the problem, the Federal Trade Commission, after extensive investigation and hearings, ordered the United States Steel Corporation, and its subsidiaries to cease and desist from the sales of their rolled steel products on the "Pittsburgh-Plus" price system. 8 F. T. C. 1. The Commission held that the use of a single basing point at Pittsburgh for steel plants over the country was a violation of § 2 of the Clayton Act, as well as § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, as they then read. The respondents in that case sought no review of the Commission's order and filed with the Commission a formal statement of intended compliance with it.

Petitioners also rely on the failure of the Commission to make further orders against basing point systems in the period from 1924 to the passage of the Robinson-Patman Act in 1936. The Commission undertook no further proceedings because of difficulties of enforcement which it attributed to the exemption provisions of § 2 and to decisions of the lower federal courts in Clayton Act cases. Instead it pressed for clarifying amendments to the Act. See the Commission's Final Report on the Chain Store Investigation (1936), Sen. Doc. No. 4, 74th Cong., 1st Sess., pp. 89-90, 96-97. The Robinson-Patman Act was adopted in response to the Commission's recommendation that defects in § 2 be remedied and its prohibition of price discrimination strengthened.

Finally, petitioners argue that Congress, by the rejection of a provision of the Robinson-Patman Bill, which would have in effect prohibited all basing point systems, has indicated its intention to sanction all such systems. This provision, as reported to the House by the Committee on the Judiciary, would have defined "price", as used in § 2 of the Clayton Act, as meaning "the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f. o. b. factory basis, in order to avoid the prohibited discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. These effects were recognized in the Committee's report, see H. Rep. No. 2287, 74th Cong., 2d Sess., p. 14, and in the debates upon the Robinson-Patman Bill. Cf. 80 Cong. Rec. 8118, 8223-8224. Indeed, the provision would have prohibited such a multiple basing point system as that in *Cement Manufacturers' Assn.* v. *United States, supra,* as well as the present system.

Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2(a), as enacted, and its more restricted prohibitions of discriminations in delivered prices.

We conclude that the discriminations involved in petitioners' pricing system are within the prohibition of the Act. We pass to the question whether these discriminations had the prescribed effect on competition.

Second. Section 2(a) of the Clayton Act, as amended, prohibits only discriminations whose "effect . . . may be substantially to lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." Petitioners insist that the Commission's findings, based upon the facts stipulated, do not support its conclusion that petitioners' discriminations have the prescribed effect.

It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipiency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect. Cf. *Stand-*

ard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 356-357. But as was held in the *Standard Fashion* case, *supra*, with respect to the like provisions of § 3 of the Clayton Act, prohibiting tying clause agreements, the effect of which "may be to substantially lessen competition," the use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.

Since petitioners' basing point system results in a Chicago delivered price which is always lower than any other, including that at Kansas City, a natural effect of the system is the creation of a favored price zone for the purchasers of glucose in Chicago and vicinity, which does not extend to other points of manufacture and shipment of glucose. Since the cost of glucose, a principal ingredient of low-priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point, as Kansas City, are in a less favorable position. The consequence is, as found by the Commission, that several manufacturers of candy, who were formerly located in Kansas City or other cities served from petitioners' Kansas City plant, have moved their factories to Chicago.

Further, we have seen that prices in cities to which shipments are made from Kansas City, are frequently discriminatory, since the prices in such cities usually vary according to factors, phantom freight or freight absorption, which are unrelated to any proper element of actual cost. And these systematic differentials are frequently appreciable in amount. The Commission's findings that glucose is a principal ingredient of low priced candy and that differences of small fractions of a cent in the sales price of such candy are enough to divert business from one manufacturer to another, readily admit of the Commission's inference that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition.

The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; cf. *Labor Board* v. *Southern Bell Tel. Co.*, 319 U. S. 50, 60. We cannot say that the Commission's inference here is not supported by

the stipulated facts, or that it does not support the Commission's order.

II. *Booking Practices.*

Ordinarily, when petitioners announce an advance in the price of glucose, they allow their customers a period of five days to "book" orders, that is, secure options to purchase, at the old price, and a period of thirty days in which to take delivery upon the options. The Commission charged that petitioners have further violated § 2(a) of the Clayton Act, as amended, by permitting certain favored customers to secure options for the purchase of glucose, and to take delivery at the old price, for periods longer than those usually permitted to other customers. The Commission also charged other violations of § 2(a) in that petitioners favored certain tank wagon customers by permitting them to book orders at the lower prices charged for tank car deliveries, and to take deliveries by tank wagon over extended periods of time. The Commission found, upon ample evidence, that these discriminations were in fact made by petitioners.

Petitioners assert that the practices prohibited by § 2(a) are discriminations in price, and not in the terms and conditions of sale other than price. They rely on the fact that in the course of the progress of the Robinson-Patman bill through Congress, the phrase "terms of sale", originally included in the prohibited discriminations, was stricken from the bill. But even if the contention be accepted, we cannot ignore the fact that the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed. And the Conference Committee, in reporting on this elimination of the phrase "terms of sale" from the bill, made it clear that § 2(a) still applied to indirect as well as direct discriminations in price. It said that with the elimination of the phrase "terms of sale", the act is inapplicable to "terms of sale except as they amount in effect to the indirect discriminations in price within the meaning of the remainder of subsection (a)." H. Rep. No. 2951, 74th Cong., 2nd Sess., p. 5.

Petitioners also contend that these sales to favored customers were to meet the competition of other sellers of glucose, and were therefore excepted from the prohibition of § 2(a), by the proviso

of subsection (b) of § 2 of the Clayton Act, as amended. Subsection (b) provides:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . , the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ."

The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition. Examination of the testimony satisfies us, as it did the court below, that it was insufficient to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence petitioners failed to sustain the burden of showing that the price discriminations were granted for the purpose of meeting competition. Cf. *Federal Trade Commission* vs. *A. E. Staley Mfg. Co.,* No. 559, decided this day.

Finally it is contended that there was no evidence to support the Commission's finding, which was referable to these practices as well as petitioners' basing point practices, that the discriminations in price may diminish competition within the meaning of § 2(a). This finding as to the effect of both types of discrimination was based on the same stipulation of facts which we have already considered in connection with the basing point practices. Since the customers here are the same manufacturers of low-priced candies as were there involved, and since the price discriminations here are relatively substantial in a field where differences of a fraction of a cent in the price of candy are sufficient to divert business from one manufacturer to another, we think that the stipulation, which we find to be applicable to these as well as the basing point practices, is sufficient to support the finding of the prescribed effect on competition.

III. *Discounts to Purchasers of By-products.*

Still other price discriminations by petitioners charged and found by the Commission were discounts allowed to certain favored purchasers of gluten feed and meal, by-products of petitioners' refining of corn, and other discounts allowed to certain favored purchasers of starch and starch products. It was not and is not contended that these allowances were due to differences in the cost of manufacture, sale or delivery. But it is asserted that these discriminations did not violate § 2(a), since there was not the requisite effect on competition.

It was stipulated, and the Commission found, that the allowances in question were "sufficient", if and when reflected in whole or in substantial part in resale prices, to attract business to the favored purchasers away from their competitors, "or to force [their] competitors to resell . . . at a substantially reduced profit, or to refrain from reselling." But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition.

IV. *Advertising Allowances.*

The Commission also charged and found that petitioners violated § 2(e) of the Clayton Act, which provides:

> "(e) . . . it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

The alleged violation consisted of advertising expenditures made by petitioners for the Curtiss Candy Company in order to promote the sale of dextrose or corn sugar for use in candy manufacture. For this purpose petitioners entered into an arrangement with the Curtiss Candy Company, whereby during the years 1936 to 1939

they spent over $750,000 in advertising Curtiss candy as being "rich in dextrose". At the same time Curtiss advertised its candy as being "rich in dextrose", and made the same statement on its labels. While Curtiss was free to purchase dextrose used in the advertised candies from other manufacturers, it in fact made all such purchases from petitioners, in annually increasing quantities until it purchased a total of seven million pounds in 1939. During the same period it purchased of petitioners large quantities of glucose, the purchases increasing from nothing in 1937 to almost fifteen million pounds in 1939. Although petitioners sold dextrose to others, it did not furnish proportionally equal advertising services to them.

Petitioners say that the advertising arrangement is not forbidden by § 2(e) because it was not made with the Curtiss Candy Company as a "purchaser". But during the period in question the Curtiss Company was in fact a purchaser of petitioners' commodity. The Commission could properly infer that the advertising for which petitioners paid, contemplated the sale of that commodity to Curtiss, and that the advertising contemplated the offering for sale of the candy by Curtiss. Petitioners thus furnished a service connected with the sale or offering for sale of a commodity, upon terms not accorded to other purchasers. The statute does not require that the discrimination in favor of one purchaser against another shall be provided for in a purchase contract or be required by it. It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.

It is said also that the Curtiss Company was not a purchaser of a commodity "bought for resale, with or without processing" within the meaning of § 2(e), since the Curtiss Company buys dextrose from petitioners, but uses it with other ingredients to produce candy, an entirely new commodity, which it sells. While the Act does not define the term "processing", the conversion of dextrose into candy would seem to conform to the current understanding that processing is a mode of treatment of materials to be transformed or reduced to a different state or thing. See *Cochran* v. *Deener*, 94 U. S. 780, 788. In view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale would seem to be immaterial. The statute is aimed at discrimination by supplying facilities or services to a purchaser

not accorded to others, in all cases where the commodity is to be resold, whether in its original form or in a processed product. The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold.

And finally it is said that the Commission was without jurisdiction because the dextrose sold by petitioners to Curtiss was not found to have been sold in interstate commerce; that if the section is construed to apply to such transactions, it would be unconstitutional; and that in any case there is no showing that the transactions complained of, although not themselves in interstate commerce, have in any way affected such commerce. But the effect upon the commerce is amply shown by the interstate and national character of the Curtiss Company's business; by petitioners' advertising for Curtiss, which was itself frequently in interstate commerce, amounting to $750,000; and by Curtiss's own admission that it competed in the sale of its candy in interstate commerce, with all manufacturers of one cent and five cent bars of candy. Moreover, some of petitioners' sales to other companies, to whom these allowances were not accorded, were made in interstate commerce; thus there was a discrimination against sales in interstate commerce, well within the power of the Commission to remedy.

Petitioners make a number of other arguments or contentions of lesser moment which we have considered but find it unnecessary to discuss. We conclude that the advertising furnished by petitioners was a service or facility "connected with the processing . . . sale, or offering for sale" of the commodity purchased by the Curtiss Company upon terms not accorded to other purchasers, and therefore violated the statute.

The several violations of §§ 2(a) and 2(e) of the Clayton Act, found by the Commission, sustained by the court below, and brought here for review, fall within the prohibitions of the Act. The Commission's conclusions are amply supported by its findings and the evidence, and the judgment is

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Mr. Justice JACKSON concurs in the result.